92-1265

Supreme Court, U.S.
FILED
JAN 25 1993
OFFICE OF THE CLERK

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BRUCE B. SCHWAGER, et al.,
Petitioners,

v.

TEXAS COMMERCE BANK, N.A., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Pro Se

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APPENDIX A

Article from *Las Vegas Review Journal*, Sunday, November 25, 1990

Nevada's judicial selection process akin to legalized bribery

By Albert G. Marquis
Special to the Review-Journal

Trial attorneys, who spend more time in front of judges than anyone else, are in overwhelming agreement that judges should not be forced to run for election. In the first place, there is no way to compare one candidate's judicial acumen with his opponent's, and it is certainly impossible for the general populace to recognize and comprehend any difference. Of greater importance, this process, which can require the expenditure of two to three times a judge's annual salary, encourages favoritism and can give rise to the perception of corruption.

Every time we go through a judicial election, candidates struggle to compare themselves with their opponents and at the same time stay within the bounds of decency and judicial ethics. It is not uncommon for judicial opponents to argue about who is tougher on crime—and to bellow about the incumbent's reversal rate or debate who is more ethical.

During the recent election, Jeff Sobel cited Nevada Supreme Court opinions that were critical of Judge John Mendoza, leading Mendoza to respond that Sobel had violated judicial ethics by commenting on a pending case. Sobel's counterattack included a threat to sue Mendoza for slander.

During the same campaign period, Reno attorney Ralph Crow was suing the state bar, the attorney general, the secretary of state and the Supreme Court because he was not allowed to run against Supreme Court Justice Tom Steffen. Meanwhile, judicial candidate Milos Terzich was accusing a Supreme Court justice of unethical

conduct for endorsing Terzich's opponent, Judge Norm Robison. Obviously, even judicial candidates and their supporters find it difficult to compare qualifications.

From this morass of mud-slinging, do we really expect the public to be able to select the best person for the job? In fact, do any of the accusations cited above actually reflect on a person's ability to be a good judge? All of this might be meaningful only if we want to select a judge on the basis of who is able to make the most scurrilous accusations against his opponent. In reality, however, this bickering means more to the opponents than to the electorate. In the final analysis, the winner will be the person who has his face on the most billboards and who appears most frequently on television with his family. To win, therefore, it takes bucks—big bucks.

Where does a judicial candidate accumulate such a war chest? He solicits campaign contributions just like any other political candidate. Almost all judges and attorneys who run for judicial posts abhor the fact that they must "hit up" other attorneys and businesses for contributions, but under our system they have no choice.

Suppose a local corporation makes a $10,000 contribution to an individual who is then elected judge. That money was vitally important in winning the election, and it will be vitally important again at re-election time. In the meantime, you happen to become involved in a lawsuit with that company, and your case is assigned to that judge. Aren't we asking too much of any individual to remain fair and impartial in the face of that reality?

As a matter of fact, there is nothing to prevent that corporation (or anyone else) from making a campaign contribution to the judge right before the trial is to begin. Of course, it is illegal to give the judge a $10,000 "bribe," but it is perfectly permissible to call this payment a "campaign contribution." What we have, then, is nothing but a legalized system of bribery.

This is not to indict any of our judges. Most of them try their best to be fair. But the reality is that we are subjecting our judges to temptation. Moreover, we are giving corrupt citizens an avenue by which they can attempt to influence judges with money.

Beyond that, the prospect of being forced to run for election, along with the necessity of raising money, is so distasteful to many individuals that some of our most qualified attorneys shy away from judicial office. Combine this with the fact that judges are grossly underpaid, and it is indeed miraculous that we have as many fair, qualified judges as we do.

There are better systems. In Sweden, for example, the attorneys are required to select from their ranks those individuals who they think will make the best judges. Those attorneys are in essence drafted for six-year terms. At the end of that term, new judges are selected. The other attorneys know who is knowledgeable and fair, and there is, consequently, little chance of an unqualified or biased person becoming a judge. There are no slurs, ethical violations, lawsuits or questionable campaign contributions.

Another method for selecting judges is the Missouri plan. It provides that judicial candidates are interviewed by a screening panel, which then submits three names to the governor, who appoints one of them. This is the system we now use to fill mid-term vacancies, and it has worked well. Under the Missouri plan, a judge then runs against his own record, and the people decide whether to retain him. This plan has been heralded across the country as far superior to the general election process.

A couple of years ago, the Legislature put on the ballot Question 4, which would have scrapped our system in favor of the Missouri plan. As election day approached, it appeared that Question 4 would pass. A few days before we went to the polls, however, the R-J changed its position and announced its opposition to Question 4. The stated basis for this change of heart was the cliche that "the election process is a power that should not be taken away from the people." With that bit of drivel, Question 4 failed

by a few thousand votes, and we have since been forced to endure more judicial campaigns.

In spite of this setback and the slight opposition that exists among well-meaning but misguided individuals, the Nevada Legislature should not give up. Our judicial selection process is in dire need of reform, and it should be a priority when the Legislature convenes in January.

Marquis is a Las Vegas attorney.

APPENDIX B

THE SUPREME COURT OF TEXAS
P.O. Box 12248
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Austin, Texas 78711
John T. Adams, Clerk

September 9, 1992

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RE: Case No. D-2528
Style: BRUCE B. SCHWAGER ET AL.
v. TEXAS COMMERCE BANK, N.A. ET AL.

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied." Petitioner's motion for Supreme Court not to consider reply brief is overruled.

Sincerely,

John T. Adams, Clerk

by _____
Blanca Morin, Deputy

APPENDIX C

THE SUPREME COURT OF TEXAS
P.O. Box 12248
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Austin, Texas 78711
John T. Adams, Clerk

October 28, 1992

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RE: Case No. D-2528

Style: BRUCE B. SCHWAGER ET AL.
v. TEXAS COMMERCE BANK, N.A. ET AL.

Dear Counsel:

Today, the Supreme Court overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

JOHN T. ADAMS, CLERK

BY: _____
Tencha Damian, Deputy

APPENDIX D

Court of Appeals
First District of Texas

COPY OF JUDGMENT

BRUCE B. SCHWAGER, BETTE SCHWAGER, B.B.B.M., LTD, AND B.M. BAYOU CORPORATION, APPELLANTS

NO. 01-90-00270-CV

V.

TEXAS COMMERCE BANK N.A., CHARLES BEST, FRED FALLAS, MEYER FALLAS, MALCOLM MARCOE, HARVEY RESNICK AND WILLIAM CRAMER, APPELLEES

Appeal from the 125th District Court of Harris County (Tr. Ct. No. 87-14551).
Opinion delivered by Justices Cohen, Justices Bass and Wilson also sitting.

The cause heard today by the Court is an appeal from the judgment rendered and entered by the court below on December 8, 1989. After hearing the cause on the record of the court below and inspecting the same, it is the opinion of this Court that there was no error in the judgment. It is therefore **CONSIDERED, ADJUDGED, AND ORDERED** that the judgment of the court below be in all things **affirmed**.

It is further **ORDERED** that the appellants, **BRUCE B. SCHWAGER, BETTE SCHWAGER, B.B.M.M., LTD., AND B.M. BAYOU CORPORATION**, and their surety, **LAWYERS**

SURETY CORPORATION, pay all costs incurred by reason of this appeal.

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Bass, Cohen, and Wilson.

Judgment entered 3-12-92

APPENDIX E

INCORRECT AND INCONSISTENT STATEMENTS OF APPEALS COURT IN OPINION (MARCH 12, 1992)

Note: Many of the following statements have been previously set out in Appellants' Motion for Sanctions and Gag Order (Date Aug. 22, 1991) and their Response Brief filed on Feb. 12, 1992. This is now the third time that Appellants have complained about these incorrect statements. It is especially noted that Mr. Schwager *verified* the preceding two documents.

This Court order does not state which documents were reviewed as a basis for its opinion. Thus, it is presumed that the Court did review the Appellants' Opening Brief for substance, Appellants' Response Brief, Appellants' various motions, the transcript and statement of fact references made by Appellants.

However, it is apparent that the Court adopted Appellee TCB's Reply Brief in its entirety without a verification of the facts of this case.

Appellants dedicated pages 1-9 in their Response Brief (filed Feb. 13, 1992) just to point out the incorrect and misleading statements made by TCB in its opening statement of its Reply Brief. Other untrue statements are also shown under the specific response points.

The following is a showing of some of the incorrect and inconsistent statements made in this Court Order denying Appellants' appeal dated March 12, 1992.

1. Bette Schwager and B.M. Bayou Corp. were not allowed to be parties to the 1987 lawsuit by Judge Wittig. Judge Wittig stated that Bette Schwager was not a party. (S.F. 828). This deprived Bette Schwager of her property and her constitutional right to

due process. Bette Schwager was never served process by TCB, and she had her own causes of action.

2. B.B.M.M., Ltd. *did not* buy the downtown Houston property to operate a restaurant. It was bought to sell the property for a profit. *See* Partnership Agreement (Trial Exhibit Pl. 56).
3. Schwager also pledged a $25,000 C.D. for the InterFirst loan.
4. The Jow note was not payable to Schwager, but to Space City Sizzler Corp.
5. The Partnership leased the property to B.M. Bayou Corp. to operate a restaurant. Contradictory statement that Partnership bought property to operate a restaurant. What this does show is that B.B.M.M., Ltd. and B.M. Bayou were part of the same entity.
6. The ownership of B.M. Bayou and B.B.M.M., Ltd were the same. The only thing that was different was the tax write-off distribution as shown in the Partnership Agreement 99%-1% in favor of the Limited Partners in the Partnership and 50%-50% in the Corporation. (Pl. Trial Exh. 50).
   Note: Ownership was 50%-50% in both the Corporation and Partnership. Schwager 50, Limiteds 50. Whether the money was in Corporation or Partnership was irrelevant as Limiteds would be entitled to the same distribution.
7. The Limiteds did not pay off the InterFirst loan. This was paid from the TCB $825,000 loan.
8. Relationship between Schwager and Limiteds did not become strained until W. Cramer tried to defraud all Limited Partners and General Partner. (Appellants' Point of Error #16, p. 26 and Response Point #13, p. 33).
9. The partnership did not borrow $825,000 from TCB in Sept. of 1984. It was December of 1984.
10. Schwager and the Limiteds did not sign the Note with TCB. Schwager signed the promissory note as General Partner of the Partnership. The Limiteds *did not sign* the promissory note either as individuals or Limited Partner of the Partnership. Schwager and the Limiteds signed separate personal guaranty agreements.
11. Schwager never endorsed the Jow note to TCB. A review of the note would show this. (S.F. Contempt Hearing August 25, 1988).

12. TCB *did not* believe the restaurant income would cover the note. Neither the letters of intent nor the loan origination document shows this. (Trial Exh. TCB 55B, 55C, 55D, 55F). On the contrary, the restaurant is not mentioned at all in the Letter of Intent. Source of repayment was the *Partners' income.*
13. $125,000 was not used for operating capital. Plus, this statement does not state whether the operating capital was for the Partnership or the Corporation, clearly showing it was the same transaction and the amendment to the lease claim made by TCB and the Limiteds was a fraud on the trial court and now on the Appeals Court.
14. The working capital was not exhausted due to the restaurant continuing to lose money. Also, the $125,000 was not working capital for the restaurant. (Restaurant was owned by Limiteds as well as Schwagers, 50-50). The real unfairness of the 1987 trial and this appeal is probably best shown by the false and misleading statements made about the $125,000.
    Note: The restaurant was closed in December of 1984 prior to the TCB loan being funded. The restaurant did not open until April of 1985. The $125,000 was used to pay the bank loan payment of $11,000/mo. for January, February, and March of 1985 (approx. $33,000). Taxes on the property for 1985, attorney fees for the Partnership, repair of the parking lot, repair and remodeling of the Partnership building, 110-112 Travis Street, points for loan origination, etc. (Borrow statement Pl. trial exhibit 5).
15. The Limited Partners had to make payment to the Partnership so that the Partnership could pay on the loan, not to TCB. The Limiteds did not stop making payments on the TCB loan until Jan. 1987. No charges of wrongdoing were made against Schwager when the Limiteds stopped making payments. (S.F. March 9 Hearing Pursuant to Request of Receiver, pp. 2, 3).
16. Schwager did not sue the Limited Partners for failing to make capital contribution to cover the *restaurant debts.* Schwager sued for capital contribution for the preservation of the *Partnership property and assets.* (Tr. 128, ¶ 7; Tr. 131, ¶ 1).
17. The Limited Partners *did not* counterclaim alleging misconduct by Schwager in *operating the restaurant.* (Tr. 64-76).

18. The Limiteds did not seek damages for breach of fiduciary duty, return of capital contributions as shown in their pleadings. (Tr. 64-76) (Tr. 1-8). As shown in Tr. references, the Limiteds complained of wrongs done by Schwager which included breach of fiduciary duty and breach of contract. The requested dissolution was based on the alleged wrongdoings by Schwager. Further action was requested by Limiteds after the dissolution. (Tr. 75-76). As there was no grounds for dissolution, there was no wrongdoing by Schwager. The Partnership was not dissolved; thus, the Partnership Agreement was still the controlling document.
19. The 1986 suit *was not* tried on July 14, 1986. The 1986 trial began on July 14, 1986 and concluded on July 23, 1986. This was a full trial on the merits which did not last one day as suggested by this Court as previously noted.
20. The trial court signed a "final" judgment on Oct. 14, 1986 as indicated by its docket entry. (Tr. 1347).
21. The receiver was only appointed to sell the property (real estate agent). Receiver had no control over the operation of B.B.M.M., Ltd. or B.M. Bayou Corp. This has previously been previously shown in this document. The intent of the Partnership was to buy and sell the Property.
22. The Limiteds were ordered to pay a total contribution of $14,000/mo. (S.F. Mar. 9, 1987 Hearing Pursuant to Request of Receiver, p. 3).
23. The 1986 Judgment also provided that the trial court would consider requests from any parties to make agreements with third parties that would eliminate the need for a receivership and the sale of the Property. The preceding is not what the Judgment said.

    The actual quote is different from the above and has a far different meaning:

    "14. It is further ordered that the court will consider requests of the *Plaintiffs and Defendants to enter into any* agreements with third parties which would *obviate* the need for *continuation of the* receivership or *the ultimate forced* sale *of the property* of *B.B.M.M., Ltd.* (difference is emphasized) (Tr. 139).

Note: Paragraph 14 of the Final Judgment was to allow the Plaintiff and Defendant, if they agreed between themselves, to deal with third parties.

24. Statement made by this Court that judgment did not adjudicate the Limited Partners' claims alleging breach of fiduciary duty by Schwager and requesting return of capital contributions is not true. Limiteds did not ask for return of the capital contributions. (Tr. 64-76; Tr. 1-8). Breach of Fiduciary duty was thoroughly litigated as previously shown and as this was one of the bases for dissolution of the partnership, it was also ruled on and denied.
25. In late 1986, some of the Limited Partners approached TCB seeking to refinance the loan. This statement shows the conspiracy between TCB and the Bank as this was done secretly and which they did not have right to do as they did not sign the promissory note. (Pl. Trial Exhibit #3). This also would change the Partnership Agreement.
26. TCB approved the refinancing without Schwager knowing about it or having any input to it. (Def. Trial Exh. 48, 49, 50). Schwager did not find out about negotiation between the Limiteds and TCB until Jan. 21, 1989 almost four months after negotiations began. (S.F. 493).
27. Schwager refused the Jan. 21 refinancing because it was an attempt to obtain control of the Jow Note and also because he would have to sign release of claims. Such document released the bank of any wrongdoing. (Def. Trial Exh. 44).
28. The Limiteds again stopped paying the TCB loan (untrue). The Limiteds always paid the TCB loan until Jan. of 1987.
29. The Limiteds approached TCB for a new way to obtain the Jow Note from Schwager, not a new refinancing proposal. (Pl. Trial Exh. 75).
30. That TCB subsequently accelerated the loan is a true statement, except it leaves out the wrongful acceleration and breach of the Promissory Note. Note required ten-day cure period prior to acceleration. TCB breached contract by not giving same. (Pl. Trial Exh. 3, pp. 3, 4).
31. Schwager was not sued for conversion of rental in 1987. (Tr. 208) (Point of Error #44).

32. The Limited Partners were not sued on the Note as stated by this Court. The Limiteds did not sign the Note and were only sued on their personal guarantees.
33. Schwagers sued TCB and the Limiteds by requesting and receiving a TRO on Mar. 27, 1987, three days before TCB sued Schwager on Mar. 30. That is why Schwager should have been Plaintiff in suit, as previously shown in paragraph III.
34. The trial judge directed a verdict for TCB as Plaintiff on Schwager's claims for wrongful acceleration and breach of contract. This was done based on Schwager's allegedly having actual notice that the Note was not being paid. This was in clear violation of the Supreme Court of Texas Ruling in *Ogden v. Gibraltar*, 640 S.W.2d 232, 234 (Tex. 1982), which showed that notice of intent to accelerate was required even though borrower knew the loan was in default.
35. The trial judge submitted no jury question on any claims by Bette Schwager and B.M. Bayou Corp. This statement is conclusive proof that Bette Schwager was denied her constitutional right of due process on her claims and that her property was taken from her. Judge Wittig would not let Bette Schwager be a party to the lawsuit. (Appellants' Response Brief, pp. 14, 15, 16, filed Feb. 12, 1992).
36. In the last paragraph on page 4 of this opinion, the Court states in detail the ruling of the jury in Case #87-14551, while leaving out the facts relating to the questions that the trial court refused to submit to the jury such as the conspiracy issue, forgery issue, wrongful acceleration issue, usury issue, good-faith issue, breach of contract issue, Bette Schwager issues, and mental anguish and pain and suffering issue. The result of this refusal was a comment on the weight of the evidence by Judge Wittig. The jury could only conclude that Schwager was lying about these claims he made during trial. (Points of Error #7 and #42) (Tr. 1191-1212).
37. The Court further leaves out the fact that all of the charges against Schwager were answered in the 42 points of error that were stricken by this Court without being reviewed for substance, only form. *Davis v. City of San Antonio*, 752 S.W.2d 518, 523 (Tex. 1988).

38. Had the Court reviewed Appellants' points of error for substance, all the charges against Schwager would have been reversed. An example of this is the fraudulent inducement charge. Not only do the facts not support this charge, but as a matter of law, this issue should never have been submitted to the jury. (Appellants' Points of Error #38 and #43 and Appellants' Response Point #26 and Response to Limiteds' Brief, p. 59).
39. Under the preliminary procedure matter on appeal section, this Court stated the fact that supported Appellants' submission on the 99-page brief. This Court leaves out an extremely important event in the chronology of events. This Court approved a motion for an extension of time to file a brief in excess of 78 pages and then cut off Appellants legs by denying the actual submission of the brief in excess of 78 pages. A detailed answer to the events stated by this Court is made in referenced Motion to Reconsider Striking of Appellants' 42 Points of Error dated Mar. 8, 1992.
40. The Court in order to support its striking of the 42 points of error has raised some interesting questions:
    a. Why did not the Court on August 8, 1991 strike the Appellants' Brief or order a re-briefing if in fact the Brief was not adequate as the Limiteds stated in their Motion to Strike Appellants' Brief?
    b. Why did the Court wait until Feb. 24 at 3:00 p.m. to fax Appellants the order striking 42 of Appellants' 44 points of error? The appeal was submitted at approximately 9:30 p.m. on Feb. 26, 1992.
    c. Why did the Court deny Appellees Limited Partners' Motion to Strike Appellants' Brief?
    d. Why did this Court not mention that Appellants filed a Response Brief (Supplement) to TCB's Reply Brief on Feb. 12, 1992, twelve days before this Court struck 42 of Appellants' points of error?
    e. Why did this Court not rule on Appellants' Motion to Reconsider Striking of the 42 Points of Error filed on March 8, 1992 prior to making its ruling on the entire appeal on March 12, 1992?

41. According to the bases for the ruling on Appellants' 42 points of error, Points of Error #1 and #4 should also have been stricken. This, however, would not have been allowed. "We concluded that the Court of Appeals should not have affirmed based on Inpetco's briefing inadequacies without first ordering Inpetco to rebrief." *Davis v. City of San Antonio*, 752 S.W.2d 518, 521 (Tex. 1988).
42. Appellants were never given the opportunity to re-brief based on the specific objections made by the Appeals Court as ruled on Feb. 24, 1992. This assumes that Appellants' Supplemental Brief was not reviewed. Appellants requested this opportunity but did not receive a ruling on same. Appellants should have been given time to re-brief after being given notice of the specific defects or irregularities. *Stevens v. Stevens*, 809 S.W.2d 512, 513, 514 (Tex. App.—Houston [14th Dist.] 1991). Appellants requested that TCB give specific objections to its brief in its Motion for Reconsideration of Order Requiring Appellants to Re-Brief and Order Striking Appellants' Brief (Filed May 20, 1991, p. 2).
43. Schwager filed a Motion to Reverse Judgment and Dismiss the Case on Sept. 12, 1992. Schwager then filed another motion due to the Court's not ruling on the first motion.
44. On 11/21/91, the Court denied Schwager's Motion to Reverse the Judgment and Dismiss the Case.
45. Schwager submitted a Motion to Reconsider on 12/5/91.
46. On 1/30/92, 20 days before submission, the Court strangely reactivated the Motion to Reverse Judgment and Dismiss Case and carried it with the appeal.
47. Schwager states very succinctly in his Motion to Reverse the Judgment and Dismiss (Sept. 12, 1991) Appellants' position on the jurisdiction of the trial court and Court of Appeals. Also, in his second motion and his motion to reconsider, Appellants do not believe that this Court has presented Appellants' position adequately as set out in the Order of March 12, 1992 affirming the trial court opinion.
48. The Court leaves out the fact that Judge Wittig violated the local rules of the Court when he consolidated the older case into the newer case. Motion for Sanctions and Gag Order Exh. "G" 8/22/91. The Rules called for Case #87-14551 to be

consolidated into 86-07376. *Sante Fe Drilling v. O'Neil*, 774 S.W.2d 423, 424 (Tex. App.—Houston [14th Dist.] 1989).

APPENDIX F

LIST OF DOCUMENTS SHOWING FINALITY OF 1986 JUDGMENT

1. 7/14/86 - 7/23/86 Docket Entry - All issues of law and fact were submitted to the court. (Pages A2-3, A2-4)
2. 8/8/86 - Rendition of Judgment - Non-jury trial on merits of case. (Pages A2-5, A2-6)
3. 8/11/86 - Docket Entry - Denied dissolution of Partnership. (Page A2-4)
4. 8/26/86 - Letter - Limiteds' Attorney - Final judgment that will include receiver. (Pages A2-7, A2-8)
5. 10/14/86 Docket Entry - Final judgment signed. (Page A2-4)
6. 10/14/86 - Judgment - No issues left unresolved. (Pages A2-9 through A2-14)
7. 3/9/87 - Hearing - Transcript - Limiteds walked away - financial reasons - no claim made against Schwager for wrongdoing. (Pages A2-15 through A2-18)
8. 5/26/87 - Hearing Transcript - lawsuit is over and final, lost jurisdiction in '86 case, only thing I have jurisdiction over is Receiver in aid of judgment, can't bring up a whole new thing. (Pages A2-19 through A2-21)
9. 7/27/89 - Order - clarifies '86-'87 case relationship. (Page A2-22)
10. 3/4/88 - Order - Execution of judgment in '86 Case - used '86 case # on Executive Order. (Pages A2-23, A2-24)
11. 10/25/84 - Motion in Limine - Judge Wittig states that he was not going to try claims between Limiteds and Schwagers. (Pages A2-25, A2-26)
12. 7/16/91 - Motion TCB - "The Appellees incidentally obtained a judgment against the other Appellees in a related case." (86-07376) (Page A-27)
13. 7/29/91 TCB Reply Brief (p. 12): "Even if a final judgment had been entered . . . ." (Page A-28)

Additional Documents

14. Homestead Agreement. (Referenced at p. 14 of this document) (Pages A2-29, A2-30)
15. Findings and Recommendations. (Referenced at p. 14 of this document) (Pages A2-31, A2-32)
16. Pages 1 and 13 of Modified Final Judgment. (Referenced at p. 14 of this document) (Pages A2-33, A2-34).
17. Pleading Case #86-07376 (Tr. 74) (Referenced at 3 of this document) (Page A2-35)

Note: The preceding documents are listed in Motion to Reverse Judgment and Dismiss Case. This motion was ordered to be carried with the appeal by the First Court of Appeals 1/30/92.

APPENDIX G

Statement of Facts Hearing, May 26, 1987

before --

MR. AXELRAD: Judge, this lawsuit's been pending since 1986, and the bank has been brought into it only after the bank filed suit in February of '87.

THE COURT: No, your suit was filed in 1987 on the note.

MR. AXELRAD: Right.

THE COURT: He has filed-- although he filed it under the 86 number as an amended petition, that's not correct.

MR. AXELRAD: But the bank has never been a party to that action in 86.

THE COURT: What you have done -- and that's why this file got all screwed up, and they came down to see me last week. What you have is a counterclaim against him in the 1987 lawsuit. The 1986 lawsuit is over and final. Okay?

MR. JOSEPH COHEN: Could we have these parties instructed to replead in the 87 cause number? That goes right to the issue. We've tried this case 99.9 percent once, and it's not fair to you or the parties to try this case again.

THE COURT: You have a counterclaim in his 1987 lawsuit, and it's all going to bear that 87 number henceforth.

MR. AXELRAD: Okay.

THE COURT: It is not an amended petition against his clients to which they were never a party in a lawsuit that I'm sure I've lost jurisdiction that was entered in, God knows-- October of '86.

MR. JOSEPH COHEN: October of last year.

THE COURT: The only thing I have any continuing jurisdiction over in aid of my judgment is a

Receiver, but that doesn't mean everybody can turn around and sue everybody and bring up a whole new thing that doesn't have anything to do with the Receiver.

MR. RONALD COHEN: If the Court please, my name is Ron Cohen, and I'm appearing for Steve Smith who was just served and has an answer date next Monday, June 1st.

THE COURT: Right.

MR. RONALD COHEN: He's been added as a brand new Defendant, two and a half million dollars. We'll do everything we can to expedite everything we need to do to go to trial on the merits.

You mentioned September. I just want to make a record now so that I can be heard the first time on this case that I will be in New Mexico during the week of September 14th and couldn't try

APPENDIX H

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APPENDIX I

Houston Chronicle
Sunday, Sept. 13, 1992

Texas justice for sale? Judge it yourself.

By Clay Robison

Austin — The business, medical and insurance communities screamed bloody murder in the 1980s when trial lawyers shelled out millions of dollars in campaign contributions to pro-plaintiff candidates and purchased a Texas Supreme Court that seldom saw a damage suit it didn't like.

"Outrageous" was one of the milder terms sputtered by the old-line establishment after it realized that it had been outmaneuvered by a bunch of brash, greedy, political upstarts.

Gone were the days when the major, defense-oriented law firms that had the establishment on retainer could, by and large, depend on conservative legal interpretations from judges with whom they could feel comfortable.

Outrageous? Of course.

The controversy even produced some national embarrassment for the Texas judiciary in a segment on CBS-TV's *60 Minutes* program, not unfairly entitled, "Is Justice for Sale?"

But did it produce meaningful campaign finance reform from the Texas Legislature? Unfortunately, no.

The pendulum on the high court has since largely swung back the other way, but less from a sense of real reform than from a compounding of the problem.

Doctors and business-oriented special interests dug deeper into their own pockets and — in key, high-dollar elections in 1988 and 1990 — bought their own justices to replace activist members of the high court.

I don't use the words "purchased" and "bought" in the sense that the trial lawyers or the business community backed specific judicial candidates who had overtly promised to rule a certain way on pending or anticipated cases.

I use them in the sense that each side dumped tons of money into the campaigns of judges and candidates whom backers believe or hoped would support their philosophical viewpoints on the bench.

The practice is clearly unhealthy because a fair system of justice demands not only a judiciary that is independent but also a judiciary that promotes public confidence in its independence and integrity, and both those requirements are jeopardized by a virtually unrestricted campaign finance system.

The problem is an old one and has been discussed and studied at length. Now, it is being studied again by the new Texas Ethics Commission, which was instructed by the Legislature to look into the problem of financing political campaigns generally and judicial campaigns in particular.

Special interest campaign financing is a problem in all statewide races and many local races as well, but most critics view the potential tainting of judges with particular alarm because they believe the interpreters of the law should be more independent than most other public officials, including those who write the law.

The issue is more than just campaign finance. It also involves the way Texas selects its judges. And most of the concern is focused on the Texas Supreme Court, whose members are unknown to most Texans but, as the state's court of last resort in civil cases, has tremendous power over our system of justice.

As long as members of the Supreme Court have to seek election statewide against opponents who, like themselves are unknown to most voters, campaign contributions will continue to be crucial to their success.

"Texas is a big state, and there is not way to communicate that is cheap," Chief Justice Tom Phillips told the Ethics Commission last week.

Even after voluntarily limiting individual contributions to his campaign to $5,000, Phillips still managed to raise and spend a record $2.5 million in a hotly contested race against a trial lawyer-backed opponent two years ago. And those costs promise to continue to escalate.

Changing to a system of appointed judges, creating a non-partisan ballot for judges, shortening the campaign season with a

later primary or imposing a system of taxpayer financing of judicial races all have been discussed as potential solutions.

But the Legislature has consistently refused to change the judicial selection process and isn't likely to unless ordered by the federal courts, and lawmakers aren't likely to approve public financing of judicial campaigns in the midst of state government's continuing financial problems.

Some experts think the federal courts will eventually order major changes in the way Texas selects its judges. But, for now, the most reasonable solution is the imposition of strong limits on the amount of money that judges and judicial candidates — and all other political candidates, for that matter — can raise.

Robinson is chief of the Chronicle's Austin Bureau.

APPENDIX J

The Houston Post
Wednesday, September 2, 1992

Law firms top donors to justices
Trial layers urge reform of campaign law

By Mary Lenz
Post Austin Bureau

AUSTIN — Justice may not be for sale in Texas, but it's costing trial lawyers more than they want to pay.

Law firms in 1991 and 1992 contributed three times as much to both Democratic and Republican candidates to the Texas Supreme Court as doctors, political action committees or businesses.

Special interest groups so far have made 79 percent of all contributions to candidates seeking Supreme Court seats, according to a study released Tuesday.

Austin trial lawyer David Bragg said a group of trial lawyers commissioned the $50,000 analysis of more than 47,500 campaign contributions.

They wanted to document the amount spent on successful high court candidates by banks, insurance companies and other big businesses since 1988.

Bragg said consumer groups "are having fewer favorable decisions out of the court today than we have had in the last decade.

Asked if that means trial lawyers aren't getting their money's worth for their campaign contributions, Bragg said: "That's one way to look at it."

In 1991–1992, lawyers contributed nearly $1 million to Republican Supreme Court nominees and $877,000 to Democratic candidates. PACs followed, donating $323,000 to Republicans and $135,000 to Democrats. Doctors and other medical professionals trailed with $152,000 to Republicans and $8,710 to Democrats.

State law sets no limits on campaign contributions to candidates for nine Supreme Court posts. They serve staggered, six-year terms.

Doctors, lawyers, bankers, insurance companies, as well as businesses and various PACs ponied up 87 percent of the $11 million spent by winning Supreme Court candidates in 1988 and 1990.

In 1991–1992, Texas' top 25 defense law firms poured $442,821 into the campaign chests of Supreme Court candidates, with their opponents in plaintiff law firms throwing in $317,623.

Tracing law firm contributions is complicated by the practice of "bundling," or having a firm's employees make smaller contributions individually. Bragg said forcing law firms to report the total of their contributions would be a step toward reform.

Activists at the news conference to release the study differed on solutions, though they unanimously oppose giving the governor power to name Supreme Court justices.

Bragg called for public financing for Supreme Court races, and Tom Smith of Public Citizen suggested banning private contributions and financing the elections by adding $10 to the cost of filing each lawsuit.

APPENDIX K

Houston Chronicle
Sunday, Dec. 6, 1992

Selecting our judges — are single-member districts the answer?
Other reforms would serve Texas' legal system better

By Judge Michael T. McSpadden

McSpadden is judge in the 209th State District Court here.

The November defeat of state District Judge John Kyles here has renewed calls for single-member judicial districts to ensure politically correct numbers of minorities on the bench. Although this may sound like a valid objective, it would effectively sacrifice whatever is left of the independence of the judiciary.

Not surprisingly, we have heard once again the baseless cries of racism simply because Judge Kyles is African-American. I submit there were other more compelling reasons for his defeat.

For the past 10 years we have witnessed at the courthouse many of the most qualified judicial candidates lose because of partisan politics, with the uninformed straight-party lever pull on both sides dictating race after race at the bottom of the ballot. I have had many friends like Judge Kyles who have lost because of partisan politics, name identification and other factors which in no way relate to judicial qualifications and competence.

For the past several elections, I have sent a letter to all my fellow judges urging them not to "group together" with other judges of the same political party in promoting a straight-party vote. To me, judges who engage in this become nothing more than two-bit politicians at best. I also ask them not to accept any contributions from attorneys who work in their courts because of the automatic appearance of impropriety.

During the campaign season, Judge Kyles appeared on a television show and urged a Clinton/Gore vote, upsetting many voters who have every right to expect their judges to be above partisan politics. After seeing the interview, I called Kyles as a

friend and told him that his political statements were inappropriate by a judge and suggested that he make sure that portion of the interview be deleted if shown again. He offered the excuse that it was his understanding when he filmed the interview that the statement would be edited.

It has been reported that Kyles spent $150,000 on his campaign, with the vast majority of contributions coming from lawyers. I think the voters would have been more impressed had he not accepted any contributions from attorneys in the criminal law area and made that a campaign reform issue. His opponent also just happened to be a woman during the "Year of the Woman."

More importantly, Kyles was a political appointee of Gov. Ann Richards, which would certainly be a huge liability with all the publicity over the widely publicized Lena Guerrero qualifications controversy. Many of Richards' judicial appointments were defeated across the state for this same reason.

These are, no doubt, considered insignificant details by Judge Al Green of the local chapter of the National Association for the Advancement of Colored People and by columnist Lori Rodriguez of the Chronicle. To them, the call of racism is the automatic and unqualified response. This unsupported response will always provide Judge Green with media coverage at his press conferences and will provide Rodriguez with more interest in her column. And it will also further polarize an already segmented community.

Our whole legal system is based on the public's faith that difference between parties are settled in a court of law and not on the streets. Whether it is a civil dispute, a child custody hearing, the probate of a will or a criminal charge, every person entering a courtroom door should have complete assurance that he or she will be treated fairly by our judicial system. Right now in Texas we have some serious problems in justifying this public trust. The *60 Minutes* program on *Justice For Sale* and the recent HBO documentary on our family law courts have focused on these problems causing the Texas judicial system to be held with little respect by the rest of the nation. And, unfortunately, there are valid reasons for this.

We have perpetuated a system where we place our judges in the political arena every four years for our trial courts and every six years for our appellate courts. Because of our partisan election

of judges, we see almost all of our jurists wholly dependent upon the attorneys who practice before their courts for campaign expenses and upon the respective political parties as a base of support. With many of our judges, loyalty to the political party overshadows any semblance of loyalty to the judiciary. This is not the independence of the judiciary our forefathers envisioned when they created this separate branch of government.

In order to restore integrity in our system, our lawmakers must make decisions concerning judicial selection and judicial campaign contributions based upon the public's need rather than political party considerations.

Either a non-partisan countywide election or a non-partisan appointed/merit election of our judges would be the better method of reducing politics in the judiciary and also placing the most qualified candidates on the bench.

Not long ago, U.S. Supreme Court Justice Sandra Day O'Connor was the featured speaker at a local dinner. I was able to ask her about her thoughts on judicial selection. She stated the her home state of Arizona had changed from partisan selection to an appointed/merit election and that the quality of the judiciary had improved 100 percent. Justice O'Connor said that this change also solved the need for campaign contributions from the attorneys.

Single-member judicial districts would put a premium on quotas and politics and would, in effect, diminish what should be the most important consideration — the independence and competence of our judiciary. Reducing our judges to be representatives of a particular district would place a political albatross over the judiciary forever.

Further, a plan involving single-member districts would be retreating to a concept of segregation of our community based upon race, a thought which should be abhorrent to us all.

A contribution cap of $200 from any attorney who works in that area of law would go far in removing the obvious appearance of impropriety that automatically exists whenever a judge receives a large amount of money from attorneys who practice before the bench. If only our legislators would make these two essential changes, they would create a more efficient and equitable system both for us and future generations.

But this is probably not going to happen since it would call upon our lawmakers to find the courage to take a non-partisan stand for the benefit of those they represent. And the words "courage" and "lawmakers" have never been synonymous in the history of our state.

APPENDIX L

B. ANSWER TO ACTIONS OF TRIAL COURT
(from Petitioners' Application for Writ of Error)

The ruling of the Texas Supreme Court is clear as to jury issues. The judge may refuse to submit an issue only if no evidence exists to warrant its submission. Refusal to submit the jury issue was reversible error. *Brown v. Goldstein*, 685 S.W.2d 640, 41, 42, 43 (Tex. 1985).

The District Court refused to submit a Special Issue to the jury on the breach of good faith and fair dealing, breach of contract, mental anguish, and forgery relying on its erroneous partial summary judgment. The evidence of all refused jury issues is clearly set out on p. 15 of Appellants' Opening Brief.

Forgery of Deed of Trust was charged in hearing on June 27, 1988. (SF testimony of Dale Everett at hearing to remove receiver, June 27, 1988 p. 125-27). L. Rand Dennis stated that numerous loan-security documents, relied on by TCB, were forged. The Bank brought forth an "expert" who testified there was no forgery. Schwager was not allowed to produce rebuttal expert testimony proving that the documents were, in fact, forgeries. The District Court refused to submit Plaintiffs' special issue on forgery. (Tr. 1191-1212). This refusal hopelessly prejudiced Appellants. The jury could draw but one conclusion from the District Court's failure. When Schwager testified about the forgeries, conspiracy, etc., he was lying.

Likewise, although conspiracy was discussed throughout the trial, the charge was silent on the issue and did not present Plaintiffs' theory of the case. The refusal of all of these submitted issues was gross error which, in effect, prevented Petitioners from presenting their theory of the case. To the extent that TCB allowed or admitted evidence and testimony bearing upon the breach of duty of good faith and fair dealing and forgery, TCB waived any

right to rely on the previous partial summary judgment entered in its favor—even if such judgment was correct.

The District Court erroneously granted a directed verdict on Appellants' claim against TCB for wrongful acceleration and forgery. (SF November 22, 1989 pp. 130-131).

Both notice of default, intent to accelerate and notice of acceleration are required unless waived. Failure to provide any of the notices is fatal to any subsequent acceleration and foreclosure. *Ogden v. Gibraltar Sav. Ass'n*, 640 S.W.2d 232 (Sup. Ct. of Tex., 1982) at p. 234. Citing *Alan Sales & Serv. Center, Inc. v. Ryan*, 525 S.W.2d 863 (Sup.Ct. of Tex., 1975) at pp. 865-866. TCB gave no—

> "Clear, positive, and unequivocal declaration in some manner . . . of its intent to accelerate the note if default were not cured within reasonable time before it lowered the boom." *Crow v. Heath*, 516 S.W.2d 225 at p. 229.

Shumwaye Tux v. Horizon Credit Corporation, C-8669 (Tex. 1991).

Additionally, it is undisputed that TCB delayed over two months after the purported default of January 19, 1987, from taking any collection action and purportedly "negotiated" with the Appellants and the Limited Partners concerning restructuring of the note and/or cure. The TCB's long delay constituted conduct of negotiation which prevented TCB from declaring an immediate acceleration. *Alaska State Bank v. Fairco*, 674 P.2d 288 (Alaska, 1983). After these months of delay, TCB was required to provide notice of default and a reasonable opportunity to cure before declaring any acceleration. TCB failed to do this consequently the acceleration was illegal. The promissory note utilized by TCB required notice of default and a ten-day opportunity to cure. (Tr. 1125-26). The provisions for notice of default and notice of acceleration must be complied with for non-monetary as well as monetary defaults. *Covington v. Burke*, 413 S.W.2d 158 (Ct. of Civ. App., Eastland, 1967) at p. 160. See also *Jernigan v. O'Brien*, 303 S.W.2d 515 (Ct. of Civ. App., Austin, 1957) at p. 517. The record is devoid of any

evidence that TCB demanded payment of past due installments and/or a cure of any non-monetary defaults, within a reasonable time, prior to its purported acceleration.

The Trial Court "gutted" the Schwagers' case against TCB at the close of the Schwagers' case. Despite clear wording in the contract to the contrary, the Court excused TCB's failure to provide notice and granted directed verdict on the Schwagers' claims of breach of contract and wrongful acceleration. (SF Vol. 11-21-89 p. 246, LL 1-25; p. 247, LL 1-25; p. 248, LL 1-25). The Trial Court erroneously ruled that actual notice of the default excused TCB's compliance with the notes' notice provisions. ((SF Vol. 11-21-89 p. 253, LL 2-11) and the laws of Texas).

The District Court should have submitted an Issue to the jury, as requested by Appellants, on wrongful acceleration, forgery, breach of the duty of good faith and fair dealing, breach of contract and mental anguish. This failure to do so mandates reversal. Furthermore, the District Court erred in granting a directed verdict in favor of TCB, on Schwagers' claims for wrongful acceleration and forgery.

The Schwager Parties did not voluntarily withdraw their affirmative counterclaim for conspiracy. They also retained the right to use fraud and forgery with other claims. Tr. 888-894. Appellants claimed the affirmative defense of forgery in their answer (Tr. 976). Thus, the live pleadings for trial contain forgery as a claim against TCB as well as the conspiracy against TCB and the Limiteds. (Tr. 907).

TCB's summary judgment, if in fact there was one, was only a *partial* summary judgment, which is interlocutory. The Court has the right to set aside this judgment at any time. Allowing evidence of all the counterclaims of Schwager Parties negated any effect of the partial summary judgment and thus tried the case by consent. *City of Houston v. Socony Mobil Oil Co.*, 421 S.W.2d 427, 428, 430 (C.A. Texas—Houston [1st Dist.] 1967). It is also noted that the partial summary judgment did not eliminate claims made against the Limiteds. *Gainsville Oil & Gas v. Farm Credit Bank*,

795 S.W.2d 826 (Tex. App.—Texarkana 1990). Limiteds did not request a summary judgment.

The burden of proof is on the movant to establish his right to a summary judgment. Non-movant lack of answer does not entitle movant automatically to a summary judgment. *Harley-Davidson Motor Co. v. Young*, 720 S.W. 211, 213, 214 (Tex. App.—Houston [14th Dist.] 1986). Partial summary judgment is based on Ed Stringer's perjured testimony. When the credibility of the affidavit is in question, a summary judgment is not proper. *Soodeen v. Rychel*, 802 S.W.2d 361, 365 (Tex. App.—Houston [1st Dist.] 1990).

In order for judgment to be valid, it must be signed or orally pronounced in court with a record made of this announcement. The docket sheet is not evidence of any judgment being rendered. *Miller v. Kendall*, 804 S.W.2d 933, 943, 944 (Tex. App.—Houston [1st Dist.] 1990).

The right to discuss the Borrower Statement was reserved as previously indicated. TCB's attorney, Mr. Cheavens, was the one who solicited the information on the forgery of the Borrowing Statement (S.F. 752), not Mr. Schwartz. S.F. 1568-1569. Mr. Cheavens did not make any objection to the forgery evidence, but continued to extract 18 pages of testimony (S.F. 752-780) on the forgery claims. TCB later called a handwriting expert to testify, and Mr. Cheavens solicited another 28 pages of testimony on the forgery issue. S.F. 1494-1522. Schwager Parties' attorney, Mr. Nixon, then cross-examined the handwriting expert for an additional 18 pages of testimony on the forgery claim. Schwager Parties' rebuttal handwriting expert was not allowed to testify. (S.F. 1695, 1696). A bill of exception was made. (S.F. 1697). Appellants do not admit that the forgery claim was for rebuttal purposes only. As previously stated, forgery was an affirmative defense properly pled. A judge may refuse to submit an issue only if no evidence exists to warrant its submission. Refusal to submit the jury issues on forgery (Tr. 1191) was reversible error. *Brown v. Goldstein*, 685 S.W.2d 640, 641, 642, 643 (Tex. 1985).

The law on directed verdicts states that the "court must consider all evidence in the light most favorable to the party against whom the verdict was instructed, discarding all contrary evidence and inferences." *Collova v. Navarro*, 574 S.W.2d 65, 68 (Tex. 1978).

Forgery of the deed of trust was charged in the hearing on June 27, 1988 Hearing to Remove the Receiver 6/27/88, pp. 125, 127. TCB never named an expert to testify about the forgery in any document until trial. The judge committed reversible error in allowing an unidentified expert to testify. The June 1988 hearing was presided over by Judge Wittig, who certainly was aware of the claim of forgery of the Deed of Trust.

TCB entered evidence of good faith early in the trial. There is in excess of 50 S.F. references in Appellants' Point of Error #7. This was accomplished without any objections. Again, the Summary Judgment was interlocutory and thus was set aside when this evidence was entered into the record. *Hays v. Sullins*, 442 S.W.2d 494, 496 (C.A. Texas—El Paso 1969); *also Brown, supra.*

Clearly, the issue of good faith and fair dealing is a fact issue to be determined by the jury. *Security Bank v. Dalton*, 803 S.W.2d 443 (Tex. App.—Fort Worth 1991). As Appellees admit, the duty of good faith and fair dealing can be contracted for. There was an imbalance of bargaining power between TCB and the Schwager Parties.

The Guaranty Agreement clearly establishes the duty of good faith as it is covered by the U.C.C. This was a document prepared by TCB and was required by them as part of the loan. (Pl. Exh. 18A, p. 2, ¶ 10). Also, the equipment, furniture, and fixtures were covered under U.C.C. financing statement which also required a duty of good faith and fair dealing. The TCB loan was not a "real estate loan transaction," but a business loan, the proceeds of which were used to pay off an existing debt and provide working capital. (Stephen Smith Testimony Hearing July 14, 1986, pp. 8-13). The U.C.C. states the following: "U.C.C. 1-203 - Obligation of Good Faith. Every contract or duty within this title imposes an obligation

of good faith in its performance or enforcement." "Good faith - means honesty in fact in the conduct or transaction." *Schmueser v. Burkburnett Bank*, 937 F.2d 1025, 1027, 1032 (5th Cir. 1991).

Schwagers in their response to TCB's Motion for Summary Judgment, Tr. 888, clearly and unequivocally claim that this second acceleration was also wrongful. The harshness of the option of accelerating the maturity of an extended obligation requires both a strict reading of the terms of the option and notice to the debtor. *Brown v. Hewitt*, 143 S.W.2d 223 (Tex. Civ. App.—Galveston 1940).

CONCLUSION

Schwagers seek appellate review of a substantial monetary judgment entered against them in error. The court of appeals failed to consider the judgment entered in Case #86-07376 as final. The trial court did not have jurisdiction to consider Cases #86-07376 and #87-14551 and retry Case #86-07376 as a consolidated case. This judgment should have been reversed and dismissed as set out herein.

Suffering an erroneous adverse judgment and the denial of appellate review, Schwagers respectfully request this Honorable Court's intervention so that justice may be done. Meaningful appellate review should not be denied in this case.

Ironically, it was the 1st Court of Appeals in *Texaco v. Pennzoil*, 729 S.W.2d 768, 815 (Tex. App.—Houston [1st Dist.] 1987), that ruled "Having failed to brief points 7-8, Texaco has waived any allegations of error, but in the interest of judicial economy we will consider the argument." Does the 1st Court of Appeals practice a double standard?

PRAYER FOR RELIEF

Wherefore, Petitioners, "Schwagers," request that this Application for Writ of Error be granted and that the Supreme Court reverse the judgment and dismiss the case for lack of jurisdiction. Alternatively, Petitioners request that the judgment of the Court of

Civil Appeals be reversed and remanded to the Court of Civil Appeals for consideration of the merits of the previously unreached points of error. Alternatively, review the unreached points of error for merit and remand the case to the district court for a new trial. Petitioners respectfully request such other and further relief to which they may be justly entitled.

Respectfully submitted,

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ATTORNEY FOR PETITIONERS

APPENDIX M

ANSWER TO 1ST COURT OF APPEALS' ORDER OF FEB. 24, 1992

APPENDEX III
(from Petitioners' Application for Writ of Error)

The Appeals Court grouped points of error in its opinion of Feb. 24, 1992. TCB in its Reply Brief filed 7/29/91 also grouped points of error in violation of TRCP 74(c). The preceding has made it extremely difficult to answer the Appeals Court order striking 42 of Petitioners' 44 points of error.

The following shows that the Appeals Court erred when it struck 42 of 44 points of error. (Opinion Feb. 24, 1992).

a. Point of Error #2 - The Petitioner did set out in the record where the complaint was presented to the trial court and received an adverse ruling. This was clearly shown in S.F. Ref. 178-186, p. 7, of Appellants' Opening Brief where Judge Wittig admitted this. The culmination of the res judicata issues was alluded to at the very end of the trial when the trial judge, Don Wittig, begged the appeals court's indulgence for his error and indicated he had looked at the entire record while wrestling with the problem. (S.F. Vol. 10, pp. 1738, 1739). This reference was made on p. 9 of Appellants' Opening Brief. The other S.F. references in this point show other res judicata objections and the ruling. Motion for New Trial (Tr. 1257 p. 3 also shows objection for res judicata. This motion was denied by the trial judge Tr. 1331. Point of Error #24. Judge Wittig also acknowledged the issue of res judicata in S.F. Ref. Vol. 6, p. 1080, and he overruled the objection on page 1090 (p. 7 Appellants' Opening Brief). Appellants' Response Brief point #2 is in addition to these arguments (pp. 11-14). Res judicata objection was made and denied. Appendix pages A2-1, A2-2.

b. Points of Error 5, 38, 43.

Point of Error #5 - Schwagers' complaints were made in S.F. reference on page 12, e.g., 11/20/1989, pp. 49-51. The reference also contained the adverse rulings. Also, objections were contained in Petitioners' Motion for New Trial Tr. 1257 pp. 23, 26, 31 and 36 which was denied Tr. 1331. *See also* Point of Error #24.

Point of Error #38. - TRCP 324b and 329b require a Motion for New Trial to preserve evidence and insufficiency of evidence points of error. This was accomplished in Motion for New Trial p. 23 Tr. 1257 and denied in Order dated 2/27/90 Tr. 1331.

Point of Error #43 - S.F. Ref. 11/12/89, pp. 107-109 shows the submission and objection to the Parol Evidence. Response Brief 2/13/92 Response Points lists four authorities for Point of Error 43.

c. Point of Error #9 - there are in excess of three pages of fact references in this point of error. TCB in the Reply Brief even admits that an adverse ruling was made (vol. 11/22/91, pp. 129-131) in their Reply Brief of page 221. Also Motion for New Trial Tr. 1257, p. 31 which was denied. Tr. 1331.

d. Points of Error #18 and 19.

Point of Error #18 - It is incredible that the Appeals Court stated that there was no objection and adverse ruling on this point. This point of error reference S.F. 11/21/89, pp. 3-52, shows this information. This is the same complaint made by TCB in its Reply Brief which was answered in Schwager's Response Brief Response Point #14, pp. 34-36. On page 3, line 13 (S.F. 11/21/89, pp. 3-52, Mr. Nixon, Schwager's Attorney, stated "I object to Zimmerman being called . . . ." Page 6, L. 17. Judge Wittig stated, "Okay, the Court overrules your objection."

Point of Error #19 - S.F. Ref. 694, 695 clearly shows when Judge Wittig was not going to let Judge O'Brien testify based on TRCE 605. These same objections were made by TCB and answered in detail in Appellants' Response Brief, pp. 36-38 Response Point #15. Also Point of Error #19 contains in excess

of 40 pages of S.F. references that rebut Appeals Court claim of waiver of this Point of Error.

e. Points of Error #21 and 24.
Point of Error #21 - Each reference made in point on bias shows the objection to this bias and prejudice of the trial court. The Appeals Court could not have expected Mr. Nixon to complain about the judge's conduct after the time of the trial was set at the beginning when he admonished Mr. Nixon. S.F. 26 and 27.
Point of Error #24 - The Appeals Court makes the same objection that TCB made in its Reply Brief. This was thoroughly answered in Appellants' Response Brief Points # 16 and 17. This Court is requested to note p. 41 of the Response Brief Point #17 in relation to the legal expert Alfred Zimmerman's testimony at trial. It was Zimmerman's law firm that gave the argument against the Motion for New Trial. Response Point #17 contains three authorities.

f. Point of Error #25 - this point of error contains S.F. references and objections to the judgment issued in Case #87-14551. Further, Response Points #19 and 20, Appellants' Response Brief show that objection was made to judgment and adverse ruling made. Also, objections were made in Motion for New Trial 1257, pp. 32-37 and denied by order (Tr. 1331). Also Tr. 1257 pp. 22, 23, 25, 26.

g. Point of Error #30 - The complaints about this point of error are covered in Response Brief Point #24. Further, Mr. Schwager's own attorney's testimony was the basis for him being held in contempt and being denied a jury trial on the excessive $1,000 fine and 3 days in jail ruling by Judge Wittig. (Constitutional right to a jury trial if fine exceeds $500.)

h. Point of Error #33. The objection and denial to the Point is shown in Motion for New Trial Tr. 1257 p. 30 and the Denial Tr. 1331 *See also* Point of Error #24.

i. Points of Error #35 and 44.

Point of Error #35 - Objection and denial was made as required by TRCP 324(b). Motion for a New Trial 1257 pp. 22, 23, 25, 26 Denial Tr. 1331. This is also shown on page 45 of Appellants' Brief. *See also* Point of Error #24 and Response Point #26.

Point of Error #44 - Was to be read in conjunction with Points of Error 25 and 35. Response Point #26 also contains answers to complaints about Point of Error #44. Point of Error #44 contains the legal authorities for Point of Error #35.

j. Points of Error #36, 37, 38 and 39. These points of error were not answered by TCB. These points of error are covered in Tr. 1257 Motion for New Trial, (pages 23, 24, 25 and 26), which was denied. Tr. 1331. TRCP 324b was complied with. TRCP 329b was also complied with. *See* Point of Error #24.

k. Points of Error #40, 41 - These points of error were answered by TCB as part of its answer to Appellants' Point of Error #2. Motion for New Trial 1257 - pp. 24, 35, 36 objected to these jury issues. Order of 2/27/90 Tr. 1331 denied Motion for New Trial. *See also* Point of Error #24.

l. Points of Error #3, 11 and 29. The authorities for these points of error are contained in their respective Response Points.

Point of Error #3 - Response Point #3, pp. 15 and 10 contain no less than six cases for Appellants' Point of Error #3, starting with *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 362, 363 (Tex. 1971).

Point of Error #11 - Response Point #10, pp. 23 and 24 contain no less than five cases for Appellants' Point of Error #11, starting with *Walker v. Sharpe*, 807 S.W.2d 442, 446 (Tex. App.—Corpus Christi 1991).

Point of Error #29 - Response Point #2, pp. 11, 12 & 13 contain no less than seven cases for Appellants' Point of Error #29, starting with *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 821 (Tex. 1984).

In addition the objection and adverse ruling shown under Point of Error #2 S.F. Vol. 11/21/89, pp. 157-159.

m. Point of Error #6 - the appeals court totally ignores the fact that Appellants' claim the Summary Judgment is invalid as it was not signed. The Appeals Court's justification striking this point of error is wholly unfounded when entire point of error is read. Also the Appeals Court again ignored Appellants' Response Brief pp. 16, 17, 18. Response Point #4 which further shows the invalidity of Appeals Court ruling.

n. Points of Error #12, 20 and 14.
Point of Error #12 - The evidence sought to be admitted, its contents, and its refusal were not only shown in S.F. Ref. 226-258, but also in S.F. reference Vol. Nov. 21, pp. 67-79 and 134-140. (Page 21 of Appellants' Opening Brief). Page 22 again gives a list of the documents submitted and refused. (Defendants' Exh. 41, 42, 46, 54-66, 124). Appellants' Response Brief Response Point #11 conclusively removes any question about Appellants' Point of Error #12. It should be noted that Judge Wittig denied the evidence after admitting his vast knowledge of this case. S.F. 257, LL. 17-24.
Point of Error #20 - Point of Error #20 is to be read in conjunction with Point of Error #12 as noted on page 29 of Appellants' Opening Brief. When combined, these two points of error certainly discuss the substance of the excluded evidence. However, Appellants' Response Point #11, pp. 24-30 of the Response Brief gives the utmost detail on the contents of this excluded document, starting with "The excluded document would have proved fraud by trying to deprive Mr. Schwager of his interest in the property and the collaterally assigned Jow Note. Def. Exh. 124." "The excluded documents would have proved the conspiracy complained about by Appellants and reversed the judgment of the jury." The preceding is found at the beginning of the Response Point #11 on page 24.
Point of Error #14 - S.F. Reference 133-139 on page 25 of Appellants' Opening Brief clearly sets out where the financial information was submitted and refused. The document rejected contained the financial information of Limiteds as stated in Point of Error #14. Further, Response Point #11, pp. 24-30 of

Appellants' Response Brief filed 2/13/92 adds to the argument for Point of Error #14.

o. Points of Error #23 and 42.
Point of Error #23 - The evidence that raised the conspiracy issue was given to the jury. Appellants' Point of Error #7 sets out at least 100 references where evidence was introduced on conspiracy. As noted in this point of error, it is to be read with Point of Error #7.
Point of Error #42 - This point of error is also to be read with Point of Error #7. Reading of Appellants' Response Point #18, pp. 41-43 of Appellants' Response would fully eliminate the objections being made by the Appeals Court. Note: TRAP 74 states in the first sentence that briefs shall be brief and TRAP 74(p) states that the briefing rules should be construed liberally. Judge Cohen's interpretation of the requirements of 74(f) makes it impossible to adhere to the requirements of TRAP 74 and 74(p). The record of the refused jury charge along with a verbal statement of each conspiracy reference would take at least 20 pages of the allotted 50 pages for the Appellants' brief. This is extremely unrealistic in a complex case as Judge Cohen has stated this case was. In *Henry S. Miller*, a case that Judge Cohen rendered decision, the Appellants had a 47-page brief. Compare this case with *Henry S. Miller*:

	Henry S. Miller	Schwager
Transcript	651	2,200
S.F.	823	4,500
Exhibits	600 pages	100's of pages
Brief	47 pages	55
Refused jury Issue	Unknown	20 pages

Note: "Schwager" was three cases in one as noted by Judge Wittig and also included the '86 case, two summary judgment and a mandamus in the case on appeal.
Based on the preceding, Judge Cohen's ruling in Schwager case on appeal is unbelievably unfair. How could Schwagers

prepare an adequate brief on this complex case in 30 pages? This case also included five law firms and eleven parties.

p. Points of Error #15 and 17 - These points are to be read in conjunction with Point of Error #2. Appellants' Opening Brief (p. 26). Thus, authority for these points are contained in Point of Error #2, also showing the interrelationship of these points. Further, TCB in its Reply Brief answered Points of Error #15 and #17 with Reply Point #2. Appellants' Response Brief answered TCB's Reply Point with Response Point #2, pp. 11-14: there could not have been any question in the minds of the Appeals Court if they had read the Appellants' Response Brief filed 2/13/92. This brief was filed prior to oral argument and submission. Order striking Appellants' 42 points of error was *faxed* to Appellants on *Feb. 24, 1992.*

q. Point of Error #10. As noted by TCB in its Appellees' Brief, Point of Error #10 was replied to in Reply Points #2 and 9. Thus, Appellants Response Brief Points #2 and 9 had to be considered before Appeals Court struck this point of error. Jury strikes are fundamental error and argument made in Response Point # 9 clarifies questions on this point of error.

r. Points of Error #8 and 39.
Points of Error #2, 7, 8 and 39 are to be read together as shown on pages 1, 17, 18, 49 of Appellants' Opening Brief. S.F. Ref. Vol. 6, 1008 at p. 7 shows that the Limited Partners were in breach of the contract and had no right to sue Schwagers. This objection was overruled. S.F. Vol. 6 1090 at page 7. Court stated, "I will overrule the objection." S.F. Reference Nov. 21, 1989 pp. 243-255 at page 15 shows the objection and adverse ruling on the wrongful acceleration and breach of contract. Further, Appellants' Response Brief Point also clarifies this matter.

s. Point of Error #13 - Appellants' request for a 100-page brief was partly based on the appeal of the writ of mandamus (Feb. 1991). The ruling of the Appeals Court which complained

about the lack of detailed briefing, while not allowing Appellants the 100-page brief, is illogical and unfair.

However, the complaints made about Point of Error #13 are eliminated in Appellants' Response Brief in Reply to Appellees' Brief. The pages in Appellants' Response Brief are 30-33, Response Point #12.

t. Point of Error #16.
The evidence and objection to the evidence is shown in S.F. Ref. Vol. 11/21/89 pp. 44-63. Page 62 shows the offer of the evidence, and page 63 shows the adverse ruling. Further clarification of Point of Error #16 is demonstrated in Appellants' Response Brief, pages 33 and 34 (Response Point #13).

u. Point of Error #26 - Any concerns about this point of error are clarified by Appellants' Response Brief Response Point #21, pp. 46 and 47, and this point should be read in conjunction with Respondents' Point #2 as shown on page 47 of Appellants' Response Brief. The title of Point of Error demonstrates what the evidence admitted was.

v. Points of Error #27 and 28.
Point of Error #27 - S.F. References in this point show the evidence, the objection and adverse ruling. Vol. 6, pp. 1049, 1164-1169. However, in Appellants' Response Brief, pages 47-49 Response Point #22 a thorough discussion is made of Point of Error #27 and the complaints made by TCB in their Appellees' Brief Reply Point #22.
Point of Error 28 - As shown in S.F. Ref. Vol. 7, pp. 1253-56, Schwager was not allowed to justify closing the restaurant or anything else. However, in Appellants Response Brief, pages 49-50, Response Point #23, discusses in detail Point of Error #28 and TCB's objections made in its Appellees' Brief Reply Point #23. Authority is listed in Response Point #23 for Point of Error #28 and it also contains the substance of the evidence for this point of error.

w. Points of Error #31, 32 and 34.

Point of Error #31 - There was no rebuttal to Point of Error #31 by Appellees (TCB). However, the Appeals Court struck this point of error anyway. In *Henry S. Miller*, Judge Cohen stated at 134 that the Court did not represent the Appellants, so why here is he representing the Appellees?

Points of Error #32 and #34 - These points of error are expounded upon in Appellants' Response Brief, pages 52-55. Response Point #25. This is in response to TCB's Appellees' Brief Reply Point #25.

A motion for a New Trial (Point of Error #24) is a prerequisite to complain on appeal that evidence is factually insufficient to support jury finding and that jury finding is against overwhelming weight of evidence. TRCP 324(b) 2, 3. This motion was denied on 2/27/90 (Tr. 1331).

Appellants complied with TRCP 329b's filing requirements for Motion for a New Trial. When Rule 324(b) requires a motion for a new trial to preserve error, the complaining party is required only to comply with the filing requirement in Rule 329b to preserve the point of error. *Cecil v. Smith*, 804 S.W.2d 509 (Tex. 1991).

APPENDIX N

BETTE SCHWAGER'S DETAILED ARGUMENT

(from Appellants' Response Brief)

APPELLANTS' RESPONSE POINT #3 TO APPELLEES' REPLY POINT #3 TO APPELLANTS' POINTS OF ERROR #3 AND #25.

Bette Schwager has a constitutional right to plead and prove her causes of action. *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 362, 363 (Tex. 1971); *Derbigny v. Bankone*, 809 S.W.2d 292 (Tex. App.—Houston [14th Dist.] 1991).

Bette Schwager's claims were for breach of good faith, breach of contract, mental anguish, salary, punitive damages and attorney's fees. Tr. 907-935.

TCB required Bette Schwager to sign a Homestead Affidavit, thus having actual notice Bruce Schwager was married. (Tr. 929, 930, 931).

Community property subject to the joint management of both spouses cannot be encumbered by one spouse acting without the other's consent. *Williams v. Portland State Bank*, 514 S.W.2d 124 (Tex. Civ. App.—Beaumont 1974); *Valone v. Miller*, 663 S.W.2d 97, 99 (Tex. App.—Houston [14th Dist.] 1983). Thus, TCB was required to have Bette Schwager sign pledge of Note. TCB cannot now be heard to say it was entitled to her one half of the Jow Note.

The holding in *Carlton v. Estate of Estes*, 664 S.W.2d 322, 323 (Tex. 1983), clearly demonstrates that when the suit directly concerns the *community property*, both spouses have the right to represent themselves. One spouse does not have the right to represent the other, as TCB claims.

It is undisputed that this lawsuit was about the community property "Jow Note," among other things. Rights of the wife may be affected only by suit in which she is called to answer. *Cooper v. Texas Gulf Industries, Inc.*, 513 S.W.2d 200, 202 (Tex. 1974).

There is no evidence that Bette Schwager put up her share of community note as TCB suggests, nor did she default on any loan. Appellees' brief 16.

Carlton certainly *does not* suggest that Bette Schwager did not have to be a party when the suit was about a *piece* of *community property*.

The court erred in awarding the entirety of the Jow Note to the Bank because one half of the Jow Note is Bette Schwager's community property. As she was not a party to the lawsuit in that the Bank sought no affirmative relief from her, as none was pled or proved, the judgment goes too far in awarding the entirety of the Note to the Bank. There was also no basis for granting injunction and equitable relief against Bette Schwager as no injunction, equitable or affirmative relief was pled or proved by the Bank against Bette Schwager. *E.A. Nichols v. J.D. Wheeler*, 304 S.W.2d 229, 230 (Tex. Civ. App.—Austin 1957).

The Jow Note interest of Bette Schwager was awarded to the Bank without her permission or approval. Tr. 1234, 1236. No service was made upon Bette Schwager by TCB. TRCP 124.

APPENDIX O

JUDGMENT CASE #87-14551

NO. 87-14551

TEXAS COMMERCE BANK, N.A.	§	IN THE DISTRICT COURT OF
	§	
VS.	§	
	§	
B.B.M.M., LTD., a Texas Limited Partnership, HARVEY RESNICK, MALCOLM MARCOE, WILLIAM R. CRAMER, BRUCE SCHWAGER, FRED FALLAS, AND MEYER FALLAS	§	HARRIS COUNTY, T E X A S
	§	
	§	125TH JUDICIAL DISTRICT

MODIFIED FINAL JUDGMENT

On the third day of November, 1989, came on to be heard the trial in the above entitled and numbered cause; said cause being the parent case into which Cause No. 86-07376, styled Bruce Schwager and B.B.M.M., Ltd. vs. Harvey Resnick, et al, and Cause No. 87-56638, styled City of Houston, et al, vs. B.B.M.M., Ltd., et al, were consolidated. All parties appeared in person and by virtue of their respective attorneys of record and announced ready for trial. Trial by jury having been previously demanded, a jury consisting of twelve good and lawful jurors was duly empaneled and the case proceeded to trial on the merits;

At the conclusion of the case-in-chief of B.B.M.M., Ltd., Bruce Schwager, Bette Schwager, and B.M. Bayou Corporation, Texas Commerce Bank, N.A. moved for an instructed verdict which was granted as to the claims of B.B.M.M., Ltd. and Bruce Schwager against Texas Commerce Bank, N.A. on their claim of wrongful

acceleration and breach of contract. Other motions for instructed verdict were made and denied.

At the conclusion of all evidence, the Court submitted the case to the jury. The charge of the Court is incorporated herein by reference. On November 27, 1989, the jury rendered its verdict by answering the following jury questions as indicated hereunder:

. . . .

exemplary damages; in addition to such amount, Harvey Resnick recover from Bruce Schwager the sum of $42,000.00 as reasonable and necessary attorneys fees; and

8. Bruce Schwager, Bette Schwager, B.B.M.M., Ltd. and B.M. Bayou Corporation take nothing from either Texas Commerce Bank, N.A. or Charles Best; and

9. Bruce Schwager, Bette Schwager, B.B.M.M., Ltd. and B.M. Bayou Corporation take nothing from Meyer Fallas, Fred Fallas, Malcolm Marcoe, William Cramer, or Harvey Resnick; and

10. Harvey Resnick and William Cramer take nothing from either Texas Commerce Bank, N.A. or Charles Best; and

11. Bruce Schwager, Bette Schwager, and all of their attorneys, agents and employees, are permanently enjoined from taking any action, whether directly or indirectly, to collect any sum of money due under the terms of that certain promissory note, dated May 27, 1982, in the original principal amount of $189,500.00, executed by Wai Han Jow, and made payable to Space City Sizzler Corp.; and

12. Bruce Schwager, Bette Schwager, and all of their attorneys, agents and employees, are permanently enjoined from taking any action, whether directly or indirectly, to collect any rent for the use of the parking lot located at 110-112 Travis Street, Houston, Texas; and

13. The receivership established by this Court's "Judgment" dated October 14, 1986 is hereby dissolved. The receiver, Dale

APPENDIX P

ADVERSE PARTY PLEADINGS

Limited Partners' Trial Pleadings
Case #86-07376 July 11, 1988

14. In December of 1983, Schwager amended the Lease by forfeiting the Limited Partnership's right to collect rent from the Corporation for the year 1985. Such amendment was without the knowledge or consent of the Defendants. The Defendants asserted that such conduct constituted a breach of the Partnership Agreement and Schwager's fiduciary duty thereunder.

15. In or about January of 1986, the General Partner amended the Lease a second time under which the amount of rent to which the Limited Partnership would be entitled from the Corporation in 1986 would be 3% of the gross receipts that exceed $8,000.00/ month rather than the guaranteed minimum monthly rent of $10,500.00 as provided in the Lease. Such amendment was made by Schwager without the knowledge or consent of the Defendants. The Defendants assert that such conduct constituted a breach of the Partnership Agreement and Schwager's fiduciary duty thereunder.

16. The Defendants assert that Schwager has breached the Partnership Agreement by (i) failing to safe keep and use all of the Limited Partnership's funds and assets for the purpose and benefit of the Limited Partnership; and (ii) failing to keep a complete and accurate set of books as required by paragraph 18(a) of the Partnership Agreement.

TCB Trial Pleadings Case #87-14551 Oct. 19, 1989

Page 1

Bette Schwager has no standing to sue or recover in the capacity in which she sues. **Bette Schwager is not in privity of contract with TCB on the 825,000 Note, nor the documents securing its repayment.**

Page 3

TCB Pleads the affirmative defense of res judicata and collateral estoppel.

Limited Partners' Trial Pleadings
Case #87-14551 Mar 31, 1980

Page 1

Affirmative defense of res judicata, and/or collateral estoppel
Bette Schwager does not have standing to recover in the capacity in which she has brought suit in this cause.

APPENDIX Q

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared Bruce B. Schwager, known to be the person whose name is subscribed to the foregoing instrument as Petitioner who, after being by me duly sworn, on his oath, did depose and testify that he had read the foregoing instrument, that all of the facts alleged therein are true and correct and within his own personal knowledge.

Bruce B. Schwager

SUBSCRIBED AND SWORN TO on this the 12 day of January 1993, to certify which witness my hand and seal of office.

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

My commission expires:

2-22-94

CAROL S. COX
Notary Public, State of Texas
My Commission Expires 02/22/94

APPENDIX R

ARGUMENT FOR FINALITY OF JUDGMENT IN CASE #86-07376, 10/14/86

IN THE COURT OF APPEALS
FOR THE FIRST SUPREME JUDICIAL DISTRICT
HOUSTON, TEXAS

BRUCE B. SCHWAGER, ET AL.	§	
Appellants,	§	
	§	CASE NO. 01-90-0270-CV
v.	§	
	§	
TEXAS COMMERCE BANK, ET AL.	§	
Appellees.	§	

MOTION FOR EN BANC REHEARING TO RECONSIDER ORDER OF MARCH 12, 1992 DENYING APPELLANTS' APPEAL
(Oral Argument Requested)

Ref.: Motion to Reconsider Order of Feb. 24, 1992 Striking 42 of Appellants' 44 Points of Error, as if fully set out herein. (Dated March 9, 1992)

TO THE HONORABLE JUSTICES OF SAID COURT OF APPEALS:

Come now Bruce Schwager, B.B.M.M., Ltd., B.M. Bayou Corporation and Bette Schwager, Appellants, by and through their attorney of record, T. Ransom Cornish, and move this Court for the entry of an order which vacates order of March 12, 1992, and grants relief herein requested. In support of said motion, Appellants would respectfully show unto the Court the following:

I.
POINT OF ERROR NO. 1

THIS JUDGMENT WAS ENTERED WITHOUT JURISDICTION AND IS THEREFORE VOID.

Appellants reassert this point of error. The Court erred in denying this point of error. The following is a response to page 6, paragraph 2 of March 12, 1992 Order. This Court has erred by ruling that the 1986 judgment is "intrinsically interlocutory" because it appoints a receiver. This Court does not give any case law to support its position but refers to Tex. Civ. Prac. & Rem. Code Ann. § 51.014(1) (Vernon Supp. 1992). This statute does not state that every order appointing a receiver is interlocutory, nor does it even imply it. § 51.014 is to allow one to "appeal from an interlocutory order which appoints a receiver." The reason for § 51.014 was to allow for an appeal of an interlocutory order. An interlocutory decree "is one made pending the case and before the final hearing on the merits." *Magnolia Petroleum Co. v. Jackson*, 80 S.W.2d 388, 389 (C.A. Tex. Texarkana 1934); *also First Nat'l Bank of Dallas v. Brown*, 53 S.W.2d 604, 605 (Tex. 1932).

The 1986 Judgment was entered after a conventional trial on the merits. (Motion to Reverse Judgment and Dismiss Case Sept. 12, 1991) Exh. "A."

The following cases demonstrate that the appointment of a receiver after a conventional trial on the merits does not result in an interlocutory order and does not affect the finality of the judgment. *Magnolia Petroleum Co. v. Jackson*, 80 S.W.2d 388, 389 (C.A. Texarkana 1934); *First Nat'l Bank of Dallas v. Brown*, 53 S.W.2d 604, 605 (Tex. 1932); *Dunn v. Dunn*, 439 S.W.2d 831, 833 (Tex. 1969); *Moody v. State*, 520 S.W.2d 452, 456, 457 (C.A. Tex. Austin 1975, RNRE); *Citizen's State Bank v. Caney Investments*, 746 S.W.2d 477, 478 (Tex. 1988).

In addition, the following cases show that the finality of the judgment is not affected by the fact that future proceedings are expressly provided for in the face of the judgment to carry the

judgment into full effect. *Hargrove v. Insurance Inv. Corp.*, 176 S.W.2d 744, 746, 747 (Tex. 1944); *Medical Administrators v. Koger Prop.*, 668 S.W.2d 719, 722 (Tex. App. 1 Dist. 1983); *Schwartz v. Jefferson*, 520 S.W.2d 881 (Tex. 1975).

The trial court did not have jurisdiction to consolidate Case #86-07376 and Case #87-14531 after judgment in Case #86-07376 which became final on Nov. 14, 1986. *Citizens State Bank v. Caney Investments*, 746 S.W.2d 477, 478 (Tex. 1988); *Grayson Cty. Officials v. Dennard*, 574 S.W.2d 179, 182 (C.A. Texas Eastland 1978).

For this Court to suggest that the receivership would be perpetual if the court did not consolidate the two cases is erroneous. Surely, the court in Case #86-07376 could have terminated the receivership.

Dissolving the receivership in Case #87-14551 was improper. The receiver was appointed in Case #86-07376. A receiver was never appointed in Case #87-14551.

The 1986 judgment was executed in Case #86-07376 by visiting Judge Price on Mar. 4, 1988. This was done in the 1986 Case Number. (Tr. 639, 642). Judge Price was then the second judge to recognize the finality of the 1986 Judgment.

The Court also suggests that because the Judgment does not say final judgment, it is an interlocutory judgment. Thus, no matter what the content of the judgment or the basis for its issuance would be, as long as it says final judgment, it would be final. The heading on the judgment does not determine whether a judgment is final or interlocutory. It only shows the intention of the court. *McClennahan v. First Gibraltar Bank*, 791 S.W.2d 607, 608, 610 (Tex. App.—Dallas 1990); *Winfield v. Daggett*, 775 S.W.2d 431, 433, 434 (Tex. App.—Houston [1st Dist.] 1989).

The Supreme Court also ruled that a judgment did not have to say final in order to be a final judgment. The Court recognized as

final a judgment that was headed "Amendment Judgment." *B & M Machine Co. v. Arionic Enterprises*, 566 S.W.2d 901 (Tex. 1978).

The intention of Judge O'Brien in Case #86-07376 is shown on the Docket Sheet (Tr. 1347) which states "10/14/86 "*Final Judgment Signed*" (underlined for emphasis).

Judge O'Brien further stated the finality of the 1986 Judgment on May 26, 1987 when he stated, "The 1986 lawsuit is over and final." (S.F. Hearing May 26, 1987, p. 34, lines 24, 25).

The Court further suggests that because the judgment did not deny all relief not expressly granted, it automatically was an interlocutory order. "Mother Hubbard" provision stating that "All relief not expressly granted herein is denied" does not convert an intrinsically partial summary judgment into a final appealable order, and the converse is true that leaving out this statement does not make a final judgment not final. *Sakser v. Fitze*, 708 S.W.2d 40, 41, 42 (Tex. App.—Dallas 1986).

The contents of the "Mother Hubbard" clause is only a recommendation and is not a mandatory requirement for a judgment to be considered final. Following a conventional trial on the merits, a judgment is presumed final. *Houston Health Clubs v. First Court of Appeals*, 722 S.W.2d 692, 693 (Tex. 1986).

The general rule of *North East Indep. School Dist. v. Aldrige*, 400 S.W.2d 893 (Tex. 1966), is that after a conventional trial on the merits, judgment entered is presumed final. *Walker v. Sharpe*, 807 S.W.2d 442, 445, 446 (Tex. App.—Corpus Christi 1991).

A final judgment fully disposes of all issues and all parties in the lawsuit.

> However, a judgment which settles all the legal issues and rights between the parties is final and appealable "though further proceedings may be necessary in the execution of it or some incidental or dependent matter may still remain

> to be settled." *Hargrove v. Insurance Investments Corp.*, [142 Tex. 111] 176 S.W.2d 744, 747 (Tex. 1944).

Reviere v. Spragins, 810 S.W.2d 298, 300 (Tex. App.—Fort Worth 1991).

> In determining whether a judgment is final "Texas Courts have always given consideration to the nature of form and effect of the judgment. In arriving at whether or not a judgment is final the pleadings and evidence *must* also be taken into consideration . . . ." *Ferguson v. Ferguson*, 16 Tex. 184, 338 S.W.2d 945, 946 (Tex. 1960).

Reviere, supra at 301 (emphasis added).

The receiver appointed in Case #86-07371 was done on the court's own motion to aid in execution of its judgment. (S.F. Hearing May 26, 1987, pp. 35, 36).

The receiver's only function was to operate as a real estate agent and to sell the property. The receiver had nothing to do with the operation of B.M. Bayou Corp. (restaurant) or the Limited Partnership, B.B.M.M., Ltd. In fact, the receiver did not even have a key to the premises at 110-112 Travis Street. (S.F. Hearing on Emergency Motion for Supplemental Order Approving Sale by Receiver May 20, 1988, vol. I, pp. 54-56).

It is mandatory that the Court review the pleadings and evidence in determining the finality of the judgment. *Ferguson v. Ferguson*, 338 S.W.2d 945, 947 (Tex. 1960). This obviously was not accomplished by this Court as evidenced by the reasoning behind its order of March 12, 1992. The issue of the 1986 lawsuit was whether the court was going to uphold the B.B.M.M., Ltd. Partnership Agreement and not dissolve the Partnership as requested by the Limited Partners. This dissolution of the Partnership was requested based on the wrongdoing of the General Partner, Bruce B. Schwager. The wrongdoing complained of, among other things, was a *breach of fiduciary duty*.

Not only was the Partnership not dissolved by the Judgment in Case #86-07376, but the Limited Partners were ordered to pay $14,000/mo. in capital contributions, or forfeit their interest. Further, the 125th District Court Judge Michael O'Brien previously ordered Mr. Schwager to continue to operate the restaurant under its current conditions. (Rendition of Judgment Letter Aug. 8, 1986) Exh. "A" in Motion to Reverse Judgment and Dismiss Case, Sept. 12, 1991).

The judgment in the 1986 case was ruled final as previously indicated in this motion by Judge O'Brien and Judge Price. In addition, Judge Wittig's ruling concerning the date of Aug. 11, 1986 also recognizes the fact that the 1986 Judgment was final.

TCB in its reply brief also recognized that the 1986 Judgment was final. The Limited Partners' attorney in the 1986 case, Joe Cohen, also recognized that the 1986 Judgment was final. (Exh. "B" page 2 Motion to Reverse Judgment and Dismiss Case Sept. 12, 1991). The files of the First Court of Appeals also demonstrate that the 1986 Judgment was final when it stated that no appeal was filed in the 1986 case.

APPENDIX S

TEXAS ELECTION CODE

§ 251.003. Campaign Contributions

(a) It shall be lawful for an individual not acting in concert with any other person to expend a sum in a campaign which shall not in the aggregate exceed $100 per election for any lawful purpose out of his own funds to aid or defeat any candidate or measure, where the sum is not to be repaid to him. Such a sum will not be reportable to any authority unless it constitutes a contribution. If an individual not acting in concert with any person wishes to expend more than $100 for any lawful purpose out of his own funds to aid or defeat any candidate or candidates or measures, he may do so either by making a contribution or by complying with all of the provisions of this chapter as if he were a campaign treasurer of a political committee.

(b) It shall be lawful for any individual to donate his own personal services and personal traveling expenses to aid or defeat any candidate or measure and such a donation shall not constitute a contribution or expenditure, as defined in Section 251.001 only so long as he either is not compensated or reimbursed for same.

(c) It shall be unlawful for any person to make any contribution or expenditure in the name of another or on behalf of another without revealing that fact in order that the proper disclosure may be made.

(d) Except as expressly permitted by Subsections (a), (b), and (e) of this Section it shall be unlawful for any person, other than a candidate, his campaign treasurer, or assistant campaign treasurer, or the campaign treasurer of a political committee, to make or authorize any campaign expenditure. Except as provided in Subsections (a), (b), and (e) of this Section, campaign expenditures must be made by the candidate, campaign treasurer, or assistant treasurer, or the campaign treasurer of a political committee.

(e)(1) It shall be lawful for a corporation or a labor organization to expend its own funds for the purpose of aiding or defeating a measure by making a contribution to a political committee that supports or opposes measures exclusively.

(2) It shall be lawful for a corporation or labor organization, not acting in concert with any other person, to make direct expenditures from its own funds for the purpose of aiding or defeating a measure by complying with this Section as if the corporation or labor organization were an individual.

APPENDIX T

ARGUMENTS FOR PROOF OF CONSPIRACY AND PERJURY

A- Letter from Attorney Robert Axelrad to Bruce LaBoon
TCB - August 27, 1987 Page 3- Paragraph 4

The limited partners have recently offered to form another entity, whereby they would present to the Receiver an offer to purchase the downtown property for the sum of $745,000.00, consisting of $320,000.00 cash and a note for $425,000.00, payable monthly, amortized over 10 years, but with a five year balloon. The note would bear interest at floating prime, and would be personally guaranteed by each of the limited partners. If approved by the Courts, the Bank would release these guarantors from liability on the $825,000.00 note and proceed to judgment against Schwager for the deficiency. Whether such a deficiency could be satisfied by the collaterally assigned note is under consideration.

B- Appellants Opening Brief - March 18,1991 Page 25

Both the limited partners and TCB had previously denied any discussions of meetings for the purpose of allowing the bank to restructure the loan so as to cut off Schwager's interest in the Partnership and, thereafter, sell the land back to the Limited Partners after applying Schwager's Jow note (the sole family asset) on TCB's previous indebtedness. Schwager's counsel offered a letter which clearly impeached these denials. (Plaintiff's Exhibit 124). Schwager was a third party to the settlement proposal outlined in the letter; therefore, the so-called settlement rule did not apply.

C - Appellant's Response Brief - February 13, 1992
Pages 24, 25, 26, 28 and 29.

The excluded documents would have proved the perjury of Edward Stringer, Charles Best and Limiteds. Hearing May 23, 1988, pp. 267-68, 353, S.F. 225, 292, Documents Def. Exh. 415, 48-66 (App. Br. p. 22, ¶ 1). Attorney-client privilege was waived when the contents of this letter were discussed with Mr. Stringer at the hearing 5/23/89 pp. 267-68, 353, when he and Mr. Fallas denied any knowledge about this type of arrangement and thus committed perjury. If judge Wittig had reviewed this document, he knew or should have known it proved among other things the perjury of Mr. Stringer and Mr. Fallas at the May 23, 1988 Hearings.

As previously shown, the Stringer memo dated 8/7/87 was the basis for the Axelrad Letter 8/27/87. This memo as well as the adverse loan documents proved the common scheme and perjury of Ed. Stringer and Charles Best and the Limiteds. *See* S.F. 230-236, 244-245, 246-258; 11/21/89, pp. 76-79, 133-139. Def. Exh. 57 shows in the action and timetable portion (p. 3), the same deal to defraud Schwager Parties as the Axelrad Letter (Def. Exh. 124) and Stringer memo (Def. Exh. 55). The absolute proof of the scheme is shown in Def. Exh. 59 action and timetable portion (p. 3) when they change the deal to eliminate the Limiteds obtaining property and eliminate the note to the Limiteds for $425,000.00. The reason for this change was Mr. Schwager's receiving the Axelrad letter (Def. Exh. 124) on *Sept. 4, 1987.* (S.F. 11/21/89, p. 73).

APPENDIX U

CONSTITUTIONS AND STATUTES

United States Constitution

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Constitution

Art. 1, § 3. Equal rights

Sec. 3. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive

separate public emoluments, or privileges, but in consideration of public services.

Art. 1, § 13. Excessive bail or fines; cruel and unusual punishment; remedy by due course of law

Sec. 13. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

Art. 1, § 14. Double jeopardy

Sec. 14. No person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction.

Art. 1, § 19. Deprivation of life, liberty, etc.; due course of law

Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of law of the land.

Art. 5, § 8. Jurisdiction of District Court

Sec. 8. District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body. District Court judges shall have the power to issue writs necessary to enforce their jurisdiction.

The District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law.

§ 51.014. Appeal From Interlocutory Order

A person may appeal from an interlocutory order of a district court, county court at law, or county court that:

(1) appoints a receiver or trustee;

(2) overrules a motion to vacate an order that appoints a receiver or trustee;

(3) certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure;

(4) grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65; or

(5) denies a motion for summary judgment that is based on an assertion of immunity by an individual who is in an officer or employee of the state or a political subdivision of the state.

APPENDIX V

ORDER STRIKING 42 OF 44 POINTS OF ERROR

In The
Court of Appeals
For The
First District of Texas

NO. 01-90-00270-CV

BRUCE B. SCHWAGER, BETTE SCHWAGER, B.B.M.M., LTD., AND B.M. BAYOU CORPORATION, Appellants

V.

TEXAS COMMERCE BANK, N.A., CHARLES BEST, FRED FALLAS, MEYER FALLAS, MALCOLM MARCOE, HARVEY RESNICK AND WILLIAM CRAMER
Appellees

On Appeal from the 125th District Court
Harris County, Texas
Trial Court Cause No. 87-14551

ORDER

Based on a jury verdict, the trial court granted judgment fo Texas Commerce Bank (TCB), in its suit on a note agains appellants, Bruce Schwager (Schwager) and B.B.M.M., Ltd., an against appellees, Fred Fallas, Meyer Fallas, Malcolm Marco

Harvey Resnick and William Cramer (the limited partners), and on its cause of action against Schwager for conversion. The judgment also awarded the limited partners damages on their cross-claims against Schwager for breach of contract and breach of fiduciary duty. The judgment ordered that appellants,[1] take nothing on their counterclaims against TCB and on their cross-claims against the limited partners. Schwager has appealed from this judgment.

This is a complex case involving multiple parties and multiple claims. The record consists of 10 volumes of transcript totalling approximately 2,200 pages, 34 volumes of statement of facts totalling approximately 4,500 pages, and 14 volumes of exhibits totalling hundreds of pages.

On January 28, 1991, Schwager filed a 99-page brief and a motion to file a brief in excess of 50 pages. On February 14, 1991, we denied the motion and ordered him to file a 50-page brief. TEX. R. APP. P. 74(h). On March 14, 1991, we allowed Schwager to file a 60-page brief. On May 16, 1991, we struck Schwager's second brief due to inadequate citations to the record, and ordered him to rebrief. On June 17, 1991, Schwager filed his third brief containing 44 points of error. On July 12, 1991, one of the appellees moved to strike Schwager's third brief due to, among other things, inadequate citations to the record. We denied this motion on August 8, 1991.

We now rule that all the points of error raised in Schwager's third brief, except points one and four, are deemed waived for Schwager's failure to comply with TEX. R. APP. P. 74, despite having had three opportunities to do so. *See Inpetco v. Texas Am. Bank*, 729 S.W.2d 300 (Tex. 1987); *Henry S. Miller Management Corp. v. Houston State Assoc.*, 792 S.W.2d 128, 133-35 (Tex. App.--Houston [1st Dist.] 1990, writ denied) (op. on reh'g), TEX. R. APP. P. 83. Therefore, we strike all the points of error in

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[1]Except where otherwise indicated, the appellants will be collectively referred to as Schwager.

Schwager's third brief, except points one and four, and order that part of Schwager's appeal be dismissed.

Schwager's second point of error asserts the limited partners' claims against Schwager are barred by res judicata, collateral estoppel, "and/or" issue preclusion. Schwager's fifth point of error asserts the limited partners' claims were barred by the doctrine of compulsory counterclaim. Schwager's eighth point of error asserts TCB had no standing to file suit for collection of the entire balance on the note, and the limited partners had no standing to sue for breach of contract. Schwager's tenth point of error asserts the trial court erred in allowing the limited partners and TCB, collectively, more jury strikes than those allowed Schwager and in allowing multiple and repetitive cross-examination of Schwager. Schwager's twenty-first point of error asserts the trial court "held impermissible bias and prejudice against [Schwager]," therefore, Schwager was deprived of a fair trial and the trial court should have recused itself under "rule 18b(2)." Schwager's thirtieth point of error asserts the trial court abused its desertion by holding Schwager and his counsel in contempt during trial creating a conflict of interest which deprived Schwager of effective assistance of counsel and a fair trial. These points do not set out where in the record Schwager presented these complaints to the trial court and obtained an adverse ruling. *Henry S. Miller Management*, 792 S.W.2d at 133-35, TEX. R. APP. P. 52(a), 74(d).

We strike points two, five, eight, 10, 21 and 30.

Schwager's third point of error asserts the trial court erred in striking Bette Schwager as a party. Schwager's eleventh point of error asserts that prejudicial and incurable oral argument entitles him to a reversal. Schwager's twenty-ninth point of error asserts the trial court abused its discretion in allowing the jury to speculate concerning the effect of a final judgment in a related case resulting in the rendition of an improper verdict in this case. These points cite no authority. *See Henry S. Miller Management*, 792 S.W.2d at 131; TEX. R. APP. P. 74(f). Also, in point of error 29, Schwager seems to be complaining about the improper admission of evidence without discussing the substance of the evidence, or pointing out

where in the record he objected to the evidence and obtained an adverse ruling. *Henry S. Miller Management*, 792 S.W.2d at 133-35; TEX. R. APP. P. 74(d), (f).

We strike points of error three, 11 and 29.

Schwager's sixth point of error asserts the trial court erred in granting TCB's motion for summary judgment. Schwager claims TCB's summary judgment proof was legally insufficient. Without discussing TCB's summary judgment proof, Schwager asserts:

> TCB's summary judgment proof, when taken as a whole, fails to establish, as a matter of law, that TCB can not be held liable for the independent tort of duress and fraud or forgery. (TR 809-846)

This point presents nothing for review because it does not contain "a fair, condensed statement of the facts pertinent" to the point, as required by rule TEX. R. APP. P. 74(f).

We strike point of error six.

Schwager's seventh point of error asserts the trial court:

> erred in failing to submit a special issue on the breach of the duty of good faith and fair dealing, wrongful acceleration, forgery, conspiracy, breach of contract, and mental anguish, pain and suffering. These issues were tried by consent. Directed verdict should not have been granted on Schwager's wrongful acceleration and forgery claims.

Schwager cites to the record where the trial court refused his requested charge and where the trial court granted a directed verdict. Schwager argues evidence was presented to raise all of the foregoing issues, citing to the record in support of this assertion as follows:

> (Breach of Good faith: Vol. 1 pp. 39, 40, 42, 79, 80, 84, 97, 113-137, 140-41, 146-152, 154-156, 165-173; Vol. 2

pp. 281-83, 287-88, 292, 317-331, 345, 358-62, 366-394; Vol. 3 pp. 404-418, 422, 433, 445, 453, 454, 461, 464-466, 468-69, 476-484, 490-495-98, 499-504, 600; Vol. 8 p. 1492; Vol. 9 pp. 1679-81, 1688-92; Nov. 21 pp. 63, 67-79, 153, 154, 203, 204, 221, 234, 238-39, 247, 248, 249, 252, 253; Nov. 22 pp. 107-68; Wrongful Acceleration and Breach of Contract: Vol. 1 pp. 39, 41, 48, 112, 142-147, 174-177; Vol. 3 pp. 419-422, 446, 448-49, 470-72; Vol. 4 pp. 673-74, 799; Vol. p. 925; Vol. 6 p. 1000; Vol. 9 pp. 1548-1551, 1588, 1592-1597; Nov. 20 pp. 110, 112, 114, 117; Nov. 21 pp. 243, 244, 249-55; Nov. 22 p. 130; Forgery: Vol. 4 pp. 752-54, 759-770; Vol. 8 pp. 1494-1542; Vol. 9 pp. 1580-1601, 1605-1617, 1618-1630, 1695-92; Conspiracy: Vol. 1 pp. 37, 39, 40, 42, 45, 47-48, 50, 54, 97, 114, 115, 137, 140-41, 146-52, 162-165; Vol. 2 pp. 68-94, 269-70, 288-89, 292, 295-97, 318-331, 348-358, 366-68, 383; Vol. 3 pp. 404-418, 422, 423-429, 433, 445, 447-48, 458-461, 476-484-89, 490-95-96-98, 499-504, 521-523, 585, 597-600, 600-611; Vol. 4 pp. 641-42, 654-55, 674, 684-94, 698; Vol. 5 pp. 898-907, 924-36; Vol. 6 pp. 1006, 1067-68, 1163-64; Vol. 7 p. 1310; Vol. 8 p. 1492; Vol. 9 pp. 1582-85; Nov. 20 pp. 26, 55, 63, 86, 87-101, 102-110; Nov. 21 pp. 38-39, 67-79, 88-93, 95, 98, 134-140, 154-56, 225-26; Nov. 22 pp. 104-05, 107-08).

Schwager then makes approximately six statements describing evidence admitted at trial, but cites to the statement of facts for only one.

This point presents nothing for review because Schwager's arguments do not "include a fair, condensed statement of the facts pertinent to [this point], with references to the pages in the record" where these facts may be found as required by rule 74(f). Moreover, this point complains of the trial court's refusal to submit various questions to the jury without setting out such part of the requested charge the trial court refused, as required by TEX. R. APP. P. 74(f).

We strike point of error seven.

Schwager's ninth point of error asserts, "[T]he trial court erred in denying [Schwager's] claim of usury and no mutuality of contracts against [TCB] as the bank's charges on the indebtedness were usurious and no mutuality of remedies." Schwager's twenty-fifth point of error asserts the trial court entered an improper judgment. These points do not set out where in the record Schwager presented these complaints to the trial court and obtained an adverse ruling. *Henry S. Miller Management*, 792 S.W.2d at 133-35, TEX. R. APP. P. 52(a), 74(d). Also, the factual assertions in these points are not supported by references to the record. TEX. R. APP. P. 74(f).

We strike points of error nine and 25.

Schwager's twelfth point of error asserts the trial court abused its discretion in refusing to admit evidence of a proposed compromise and settlement agreement between the limited partners and TCB resulting in an improper verdict and improper use of abandoned pleadings.

This point does not describe the substance of the evidence sought to be admitted, as required by TEX. R. APP. P. 74(f). Schwager specifically complains of the exclusion of defendant's exhibit 124, citing to pages 226 to 258 in the statement of facts. Schwager cites to no portion of the record where he sought to introduce the evidence and obtained an adverse ruling from the trial court, as required by TEX. R. APP. P. 74(d). *Henry S. Miller Management Corp.*, 792 S.W.2d at 133-35. Pages 226 to 258 in the statement of facts contain no mention, and no refusal to admit defendant's exhibit 124.

We strike point of error 12.

Schwager's thirteenth point of error asserts the trial court abused its discretion in striking Schwager's claims from punitive damages and attorney's fees because of Schwager's counsel's failure to timely file a pretrial order.

Schwager's discussion of this point begins by stating:

> [Schwager's] Petition for Writ of Mandamus (No. 01-89-0913-CV) is incorporated by reference herein for all intents and purposes. (See Motion filed 2-1-91)

This does not comply with TEX. R. APP. P. 74(f) requiring a "fair, condensed statement of the facts pertinent" to the point, and a discussion of the facts and authorities relied upon to maintain the point. The point contains no discussion of the facts surrounding the trial court's striking of the foregoing claims for failure to timely file a pretrial order.

We strike point of error 13.

Schwager's fourteenth point of error asserts the trial court abused its discretion in ruling that Schwager could not present evidence of the limited partners' financial status to the jury. Schwager's sixteenth point of error asserts the trial court abused its discretion in refusing to admit the portions of the tape transcript of 1985 offered by Schwager under the doctrine of completeness.

These points do not state where in the record Schwager offered the evidence and obtained an adverse ruling. *Henry S. Miller Management Corp.*, 792 S.W.2d at 133-35; TEX. R. APP. P. 52(a), 74(d). Also, the points contain no discussion of the substance of the excluded evidence. TEX. R. APP. P. 74(f).

We strike points of error 14 and 16.

Schwager's twentieth point of error asserts the trial court abused its discretion by denying Schwager his right to impeach TCB and the limited partners with "Axelrad letter, Stringer memo, and bank's adverse loan review papers." Schwager's twenty-seventh point of error asserts the trial court abused its discretion in refusing to allow Schwager to prove the factual circumstances surrounding the temporary injunction entered in the cause against TCB.

The points contain no discussion of the substance of the excluded evidence, as required by TEX. R. APP. P. 74(f).

We strike points of error 20 and 27.

Schwager's fifteenth point of error asserts the trial court abused its discretion in admitting evidence proffered by TCB and the limited partners of Schwager's alleged breaches and misconduct which occurred prior to October 14, 1986. Schwager's seventeenth point of error asserts the trial court abused its discretion in allowing accounting testimony which violated the preclusive effects of a prior judgment. Schwager's eighteenth point of error asserts the trial court abused its discretion in allowing an expert witness to invade the province of the court and testify concerning the applicable law of the disputed transactions. Schwager's forty-fourth point of error asserts the trial court erred in admitting testimony that Schwager converted parking lot rentals.

These points do not set out where in the record he objected to the foregoing evidence and obtained and adverse ruling. *Henry S. Miller Management Corp.*, 792 S.W.2d at 133-35; TEX. R. APP. P. 52(a), 74(d). Also, the points contain no discussion of the substance of the objectionable evidence. TEX. R. APP. P. 74(f). The brief also cites no authority in support of points 15 and 17. TEX. R. APP. P. 74(f). Points 17 and 18 cite more than 150 pages of the statement of facts, some in 50 and 65 page segments, in 1 1/2 pages of total text, without identifying specifically the objectionable testimony.

We strike points 15, 17, 18, and 44.

Schwager's nineteenth point of error asserts the trial court abused its discretion in refusing to allow Schwager to elicit testimony from Judge Michael O'Brien "to refute testimony of witnesses and in allowing hearsay testimony of receiver."

With respect to the excluded testimony, the point does not discuss the substance of this testimony with references to the record. TEX. R. APP. P. 74(f). With respect to the testimony the trial court admitted, the point does not discuss the substance of this testimony, and it does not set out where in the record Schwager objected to the testimony and obtained an adverse ruling. *Henry*

S. Miller Management Corp., 792 S.W.2d at 133-35; TEX. R. APP. P. 52(a), 74(f). Also, the brief cites no authority in support of this point. TEX. R. APP. P. 74(f).

We strike point of error 19.

Schwager's twenty-sixth point of error asserts the trial court abused its discretion in admitting evidence that Schwager violated the partnership agreement and bank documents by changing the terms of the lease between B.M. Bayou Corporation and B.B.M.M., Ltd. Schwager's twenty-eighth point of error asserts the trial court abused its discretion in refusing to admit Schwager's testimony concerning the factual circumstances surrounding the closing of the restaurant operated by B.M. Bayou Corporation "and/or" B.B.M.M., Ltd., and the damages suffered by the loss of the "2500/mo." payment. Schwager's forty-third point of error asserts the trial court erred in allowing the admission of parol evidence to vary the terms of the subscription and partnership agreements.

These points to dot set out the substance of the objectionable evidence admitted by the trial court. TEX. R. APP. P. 74(f). Also, many of the factual assertions in these points are not supported with references to the record. *Id.* The brief also cites no authority in support of points 28 and 43. *Id.*

We strike points of error, 26, 28 and 43.

Schwager's twenty-second point of error asserts that cumulative error in the pretrial and trial proceedings was harmful and requires a new trial. This point is unsupported by any factual discussion. TEX. R. APP. P. 74(f).

We strike point of error 22.

Schwager's twenty-third point of error asserts the trial court abused its discretion by refusing to allow Schwager to amend his claims "to include conspiracy against TCB. (No surprise and tried by consent)."

This point does not state where in the record Schwager presented this complaint to the trial court and obtained an adverse ruling. *Henry S. Miller Management Corp.*, 792 S.W.2d at 133-35; TEX. R. APP. P. 52(a), 74(f). Also, Schwager claims the issue of conspiracy was tried by consent without discussing the evidence that allegedly raised the conspiracy issue. TEX. R. APP. P. 74(f).

We strike point of error 23.

Schwager's twenty-fourth point of error asserts the trial court abused its discretion in denying Schwager's motion for a new trial. In support of this point, Schwager incorporates by reference the arguments contained in his motion for new trial. This does not comply with TEX. R. APP. P. 74(f). Also, this point is neither argued nor supported by authority. *Id.*

We strike point of error 24.

Schwager's thirty-first through thirty-fourth points of error assert the jury's answer to various questions are against the great weight and preponderance of the evidence. The points do not state where in the record Schwager presented these complaints to the trial court and obtained an adverse ruling. *Henry S. Miller Management Corp.*, 792 S.W.2d at 133-35; TEX. R. APP. P. 52(a), 74(f); *see also* TEX. R. CIV. P. 324(b)(3). The brief also cites no authority in support of these points. TEX. R. APP. P. 74(f).

We strike points of error 31 through 34.

Schwager's thirty-fifth through fortieth points of error assert there is no evidence to support the jury's answer to various questions, and the evidence was insufficient to support the submission of these questions to the jury.

The points do not state where in the record Schwager presented these complaints to the trial court and obtained an adverse ruling. *Henry S. Miller Management Corp.*, 792 S.W.2d at 133-35; TEX. R. APP. P. 52(a), 74(f); *see also Steves Sash & Door Co. v. Ceco Corp.*, 751 S.W.2d 473, 477 (Tex. 1988). Also, these points

complain about various aspects of the charge without setting out those parts of the charge, as required by TEX. R. APP. P. 74(f).

We strike points of error 35 through 40.

Schwager's forty-first point of error asserts the jury's answer to two of the questions in the charge constitutes an impermissible attack on the trial court's final judgment in a related case. The point does not state where in the record Schwager presented this complaint to the trial court and obtained an adverse ruling. *Henry S. Miller Management Corp.*, 792 S.W.2d at 133-35; TEX. R. APP. P. 52(a), 74(f). Also, the point cites no authority. TEX. R. APP. P. 74(f).

We strike point of error 41.

Schwager's forty-second point of error states the trial court erred in refusing to submit special issues on Schwager's theory of the case or the issues supported by Schwager's pleadings and tried by consent. Although Schwager cites to the record where he submitted his requested charge, which the trial court refused, the point does not set out the part of his requested charge that the trial court refused, as required by TEX. R. APP. P. 74(f). Also, the point contains no discussion of evidence supporting the requested charge. TEX. R. APP. P. 74(f).

Schwager also complains the trial court refused to allow him to amend his pleadings at trial to conform to evidence of a conspiracy between TCB and others. The point does not state where in the record Schwager presented this complaint to the trial court and obtained an adverse ruling. *Henry S. Miller Management Corp.*, 792 S.W.2d at 133-35; TEX. R. APP. P. 52(a), 74(f).

We strike point of error 42.

Based on the foregoing discussion, we strike all of Schwager's points of error, except points one and four, and order this portion of the appeal dismissed.

It is so **ORDERED**.

PER CURIAM

Panel consists of Justices Bass, Cohen and Wilson.

Do not publish. TEX. R. APP. P. 90.

Order entered
True Copy Attest:

Feb.-24-1992
Kathryn Cox
Clerk of Court

APPENDIX W

JUDGMENT CASE #86-07376

NO. 86-07376

BRUCE B. SCHWAGER, ET AL	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, T E X A S
HARVEY RESNICK, ET AL	§	125TH JUDICIAL DISTRICT

JUDGMENT

On the 14th day of July, 1986, the above-entitled and numbered cause came on for trial. Plaintiffs, Bruce Schwager and B. B. M. M., Ltd. (hereinafter sometimes collectively referred to as "Plaintiffs") appeared by and through their respective representatives and counsel. Defendants, Harvey Resnick, William Cramer, Malcolm Marcoe, Meyer Fallas and Fred Fallas (hereinafter sometimes collectively referred to as "Defendants") appeared by and through their representatives and counsel.

A jury trial having been waived and all issues of fact and law having been submitted to the Court, and the Court having considered the evidence, issues the following judgment:

1. It is ORDERED that the request of Defendants for a dissolution of B. B. M. M., Ltd. is denied.

2. Because the Court finds that it would be in the best interests of all parties that a receiver be appointed to effect an orderly and satisfactory disposition of the property of B. B. M. M., Ltd., it is ORDERED that Dale Everett is hereby appointed as receiver for the property owned by B. B. M. M., Ltd. including the real property that is situated at 110-112 Travis

Street, Houston, Harris County, Texas described by metes and bounds on the attached Exhibit "A".

3. It is further ORDERED that Mr. Everett shall post with the Clerk of the Court a good and sufficient bond, to be approved by such clerk, in the amount of $1,000 payable to Plaintiffs and Defendants, conditioned as provided by law.

4. It is further ORDERED that Mr. Everett shall seek an orderly and satisfactory sale of the property owned by B. B. M. M., Ltd. and attempt to obtain fair market value for the property owned by B. B. M. M., Ltd.

5. It is further ORDERED that Bruce Schwager may continue to operate the restaurant presently operated in the property owned by B. B. M. M., Ltd.

6. It is further ORDERED that Plaintiffs shall refrain from selling the limited partnership interests of Defendant Malcolm Marcoe so long as Defendant Malcolm Marcoe makes a capital contribution to B. B. M. M., Ltd. in the amount of $3,500.00 (or such amount as the Court may fix hereafter) on the 15th day of each month hereafter, beginning on September 15, 1986.

7. It is further ORDERED that Plaintiffs shall refrain from selling the limited partnership interests of Defendant William Cramer so long as Defendant William Cramer makes a capital contribution to B. B. M. M., Ltd. in the amount of $3,500.00 (or such amount as the Court may fix hereafter) on the 15th day each month hereafter, beginning on September 15, 1986.

8. It is further ORDERED that Plaintiffs shall refrain from selling the limited partnership interests of Defendant Meyer Fallas so long as Defendant Meyer Fallas makes a capital contribution to B. B. M. M., Ltd. in the amount of $3,500.00 (or such amount as the Court may fix hereafter) on the 15th day of each month hereafter, beginning on September 15, 1986.

9. It is further ORDERED that Plaintiffs shall refrain from selling the limited partnership interests of Defendant Fred Fallas so long as Defendant Fred Fallas makes a capital contribution to B. B. M. M., Ltd. in the amount of $1,750.00 (or such amount as the Court may fix hereafter) on the 15th day of each month hereafter, beginning on September 15, 1986.

10. It is further ORDERED that Plaintiffs shall refrain from selling the limited partnership interests of Defendant Harvey Resnick so long as Defendant Harvey Resnick makes a capital contribution to B. B. M. M., Ltd. in the amount of $1,750.00 (or such amount as the Court may fix hereafter) on the 15th day of each month hereafter, beginning on September 15, 1986.

11. It is further ORDERED that Bruce Schwager, as General Partner of B. B. M. M., Ltd. shall apply the capital contributions of Defendants to the following expenses of B. B. M. M.. Ltd:

a. the monthly installment payment due on that certain promissory note dated December 18, 1984 executed by B. B. M. M., Ltd., payable to Texas Commerce Bank, Chemical;
b. real estate taxes;
c. premiums for casualty, liability and related insurance coverage;
d. maintenance and repairs incurred in the ordinary course of business; and
e. utilities.

12. It is further ORDERED that Bruce Schwager as General Partner of B. B. M. M., Ltd. shall render a monthly accounting of the disposition of all funds contributed to B. B. M. M., Ltd. by the Defendants hereafter, such accounting to be furnished to the Receiver, the Court and to Defendants by the first day of the month following the month in which contributions are made.

13. It is further ORDERED that Bruce Schwager shall render a monthly accounting as to the operation of BM Bayou Corporation and the restaurant known as Barton's Landing, such accounting to be made by the tenth (10th) day of each month commencing October 10, 1986, and such accounting to be furnished to the Receiver, the Court and the Defendants by the tenth day of each month commencing October 10, 1986.

14. It is further ORDERED that the Court will consider requests of the Plaintiffs and Defendants to enter into any agreements with third parties which would obviate the need for continuation of the receivership or the ultimate forced sale of the property of B. B. M. M., Ltd.

15. It is further ORDERED that all costs incurred herein are taxed one-half to Bruce Schwager and one-half to Defendants.

Signed this 14th day of October, 19 86.

Michael O'Brien
JUDGE PRESIDING

APPROVED:

JOHNSON & ARTIZ

By:_____
J. W. (Don) Johnson
State Bar #10736000
2600 Niels Esperson Bldg.
Houston, Texas 77002
(713) 224-7083

ATTORNEY FOR PLAINTIFFS AND COUNTER-DEFENDANTS BRUCE B. SCHWAGER & B. B. M. M., LTD.

APPROVED AS TO FORM ONLY:

HIRSCH & WESTHEIMER, P.C.

By:_____
Joseph S. Cohen
State Bar #04508370
25th Floor
RepublicBank Center
Houston, Texas 77002
(713) 223-5181

ATTORNEYS FOR DEFENDANTS AND COUNTER-PLAINTIFFS HARVEY RESNICK, MALCOLM MARCOE, MEYER FALLAS, FRED FALLAS AND WILLIAM CRAMER

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APPENDIX X

POLITICAL CONTRIBUTIONS TO THE SUPREME COURT OF TEXAS

An Appearance of Impropriety

David F. Bragg
Principle Author

Contributing Authors:

Tom Smith, Public Citizen
Karl Bayer, Texas Consumer Association
Charlotte Flynn, Gray Panthers
Dee Simpson, American Federation of State,
County & Municipal Employees

September 2, 1992

EXCERPT FROM PAGE 6 OF REPORT

The Supreme Court of Texas is the highest appellate Court in Texas. Not only does it judge cases which become the rule of law for every other civil court in the State, it also enacts rules which govern the behavior and ethical standards of lawyers. Because of its ability to profoundly affect the lives of each member of our society, the nine justices who are elected to the Court hold a sacred trust. To insure that the Court's decisions are based only on law and the facts of each case rather than current public opinion, the Court is allowed to conduct its deliberations in secret. No other branch of government is granted this right. Because the public is excluded from Supreme Court deliberations, the public has a right to demand that no other outside influence bear on the Court's decisions. And, because of the secrecy which shrouds the deliberations, like Caesar's wife, each member of the Court must studiously avoid even the appearance of impropriety. Otherwise, public trust, which is essential to the operation of the Court, is in danger of being lost. When any single source makes large campaign contributions to candidates for the Supreme Court, public suspicion naturally is aroused. The public's reaction is not unique to the Supreme Court; it occurs at every level of government, whenever those who make laws or enforce them receive financial benefits from those who are affected by the decisions. However, when the secrecy under which the Court must operate is injected into the mix along with the enormous power of the Court, significant financial contributions by special interest become even more troubling. The unfortunate reality, however, is that no one can get elected to the Supreme Court without a substantial campaign war chest. Supreme Court campaigns are very expensive. In the 1988-1990 elections, as illustrated in **Table 3,** more than $11 million was spent by justices who were successful in their campaigns.

EXCERPT FROM PAGE 13 OF REPORT

Bundling paves the way for voter deception. If the individual contributions of the members of a law firm are not added together, it is possible to make the misleading claim that a candidate has imposed a "cap" on contributions. When the individual contributions of members of large firms are added together, however, the claim becomes a sham that misleads voters.

EXCERPT FROM PAGE 14 OF REPORT

TABLES 6, 7 AND 8

ATTORNEYS WITH BAKER & BOTTS, A DEFENSE FIRM, CONTRIBUTED MORE MONEY TO SUCCESSFUL SUPREME COURT CANDIDATES THAN ANY OTHER SINGLE GROUP OF LAWYERS IN THE STATE. ATTORNEYS WITH VINSON & ELKINS, ANOTHER DEFENSE FIRM, CONTRIBUTED THE SECOND HIGHEST AMOUNT.

Top 50 Law Firm Contributors
1988 thru 1990

Firm Name	Totals
Baker & Botts	$197,208.57
Vinson & Elkins	$158,212.00
Bracewell & Patterson	$97,627.00
Law Offices of Frank Branson	$96,985.62
Helm, Pletcher, Hogan, Bowen & Saunders	$95,725.00
Fulbright & Jaworski	$80,265.00
Law Office of Pat Maloney	$72,550.00
Baldwin & Baldwin	$66,500.00
Wellborn, Houston, Adkinson, Mann & Sadle	$63,055.60
Locke, Purnell, Rain & Harrell	$62,484.00
Fisher, Gallagher & Lewis	$60,750.00
Baron & Budd	$55,635.00
Krist, Gunn, Weller, Neumann & Morrison	$55,100.00
Liddell, Sapp, Zivley, Hill & Laboon	$53,570.00
Umphrey, Swearingen & Eddins	$52,600.00
Haynes & Boone	$49,600.00
Strasburger & Price	$46,970.00
Mithof & Jacks	$45,025.00
Thompson & Knight	$44,430.00
Groce, Locke & Hebdon	$44,285.00
Jones, Jones, Curry, & Roth	$44,000.00
Andrews & Kurth	$43,700.00
Reaud, Morgan & Quinn	$43,350.00
Kelly, Appleman, Hart & Hallman	$41,115.00
Glenn Vickery & Associates	$40,620.66
Jamail & Kolius	$38,550.00
Perry & Haas	$38,500.00
Edwards & Terry	$38,260.00
Tinsman & Houser	$38,250.00
Stubbeman, McRae, Sealy, Laughlin & Browder	$38,012.00
Jones, Day, Reavis & Pogue	$37,750.00
Cantey & Hanger	$37,050.00
Hughes & Luce	$36,825.00
Law Offices of Stanley W. Crawford	$36,500.00

Akin, Gump, Strauss, Hauer & Feld	$36,400.00
Ernest Cannon & Associates	$35,500.00
Graves, Dougherty, Hearon & Moody	$34,062.47
Law Offices of Gilbert T. Adams. Jr.	$33,840.74

TABLE 6

APPENDIX Y
OPINION OF FIRST COURT OF APPEALS AFFIRMING JUDGMENT

No. 01-90-00270-CV

In The
Court of Appeals
For The
First District of Texas

BRUCE B.SCHWAGER, BETTE SCHWAGER, B.B.M.M., AND B.M. BAYOU CORPORATION, Appellants
vs.
TEXAS COMMERCE BANK, N.A., CHARLES BEST, FRED FALLAS, MEYER FALLAS, MALCOLM MARCOE HARVEY RESNICK, AND WILLIAM CRAMER,
Appellees
On Appeal from the 125th District Court
Harris County, Texas
Trial Court Cause No. 87-14551

OPINION

This is an appeal from a judgment based on a jury verdict. We affirm. On December 8, 1989, the trial court signed a judgment in favor of Texas Commerce Bank (TCB) on its note claim against appellants, Bruce Schwager (Schwager) and B.B.M.M. Ltd., and appellees, Fred Fallas, Meyer Fallas, Malcolm Marcoe, Harvey Resnick, and William Cramer (the limited partners), and on its conversion claim against Schwager. The judgment also awarded the limited partners damages on their cross-claims against Schwager for breach of contract and breach of fiduciary duty. The trial court's judgment ordered that Schwager, B.B.M.M., and the other appellants, Bette Schwager and B.M. Bayou Corporation (B.M. Bayou),[1] take nothing on their counterclaims against TCB and on their cross-claims against the limited partners.

Facts

In January 1984, Schwager and the limited partners formed a limited partnership, B.B.M.M., Ltd. (the partnership), to buy land in downtown Houston to operate a restaurant. Schwager agreed to be the general partner, to manage the restaurant, and to account to the limited partners. The limited partners agreed to pay the partnership debts secured by partnership property. They expected the restaurant's income to cover the partnership debts.

The partnership financed the purchase with a loan from Interfirst Bank (Interfirst loan), which was secured by a lien on the property, an assignment of rentals, and the assignment of a note (the Jow note) payable to Schwager. The partnership leased the property to B.M. Bayou to operate the restaurant. Schwager was the sole director, president, and a 50% stockholder of B.M. Bayou, and the limited partners owned the rest of B.M. Bayou's stock.

The restaurant operated at a loss, and the limited partners had to pay the Interfirst loan. The relationship between Schwager and the limited partners began to sour.

In September 1984, TCB loaned the partnership $825,000. Schwager and the limited partners signed the note and personally guaranteed the loan. The limited partners pledged additional collateral for this loan, and Schwager pledged the Jow note. The TCB loan was also secured by a lien on the property. TCB believed the restaurant's income would cover its note. Approximately $700,000 was used to extinguish the Interfirst loan, and $125,000 was used for new working capital.

By March 1985, the working capital was exhausted and the restaurant continued to lose money. The limited partners had to make the payments to TCB to avoid a default, and their relationship with Schwager continued to deteriorate. Finally, the limited partners stopped making payments on the TCB loan.

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[1] Except where otherwise indicated, the appellants will be collectively referred to as Schwager.

In February 1986, Schwager, on behalf of the partnership, sued (the 1986 suit) the limited partners, alleging they breached the partnership agreement by failing to make capital contributions to cover the restaurant's debts. The limited partners counterclaimed, alleging misconduct by Schwager in operating the restaurant, and sought damages for breach of fiduciary duty, return of capital contributions, dissolution, and an accounting.

The 1986 suit was tried without a jury on July 14, 1986 and the trial signed a judgment on October 14, 1986. This judgment denied the limited partners' request for dissolution, but appointed a receiver to sell the partnership property. The 1986 judgment also ordered Schwager to refrain from selling the limited partners' partnership interests so long as they made capital contributions as agreed in the partnership agreement. The 1986 judgment also provided that the trial court would consider requests from any parties to make agreements with third parties that would eliminate the need for a receivership and the sale of the property. The judgment did not adjudicate the limited partners' claims alleging breach of fiduciary duty by Schwager and requesting return of their capital contributions.

In late 1986, some of the limited partners approached TCB, seeking to refinance the loan. The limited partners and TCB agreed to do so, but Schwager refused. In January 1987, the limited partners again stopped paying the TCB loan. In March 1987, the limited partners approached TCB with a new refinancing proposal, but TCB rejected it. TCB subsequently accelerated the loan, but received no payments.

Trial Court Proceedings

In 1987, TCB sued (the 1987 suit) Schwager, the partnership, and the limited partners on the note, and sued Schwager for conversion of rentals. Schwager individually and on behalf of the partnership, his wife, Bette Schwager, and B.M. Bayou, filed counterclaims against TCB and cross-claims against the limited partners, alleging various theories of recovery.

The 1987 suit went to a jury trial on November 1989. The trial judge directed a verdict for TCB as plaintiff on its note claim

and for TCB as defendant on Schwager's claims of wrongful acceleration and breach of contract. The trial judge submitted no jury questions on any claims by Bette Schwager and B.M. Bayou.

The jury found against Schwager and the partnership on their claims against the limited partners for breach of the partnership agreement, breach of fiduciary duty, and tortious interference with contract. The jury found for TCB on its conversion claim against Schwager, and award TCB compensatory damages. The jury also found that Schwager's breach of fiduciary duty was "committed intentionally, maliciously, or with heedless and reckless disregard of the rights" of the limited partners, and awarded them punitive damages. The jury found that Schwager fraudulently induced the limited partners to enter the partnership agreement. On December 8, 1989, the trial judge signed a judgment (the 1989 judgment), based on the jury findings and the directed verdicts. This judgment is the subject of this appeal.

Preliminary Procedural Matters on Appeal

The appellate record consists of 10 volumes of transcript totaling approximately 2,200 pages, 34 volumes of statements of facts totaling approximately 4,500 pages, and 14 volumes of exhibits totaling hundreds of exhibits.

On January 28, 1991, Schwager filed a 99-page brief and a motion to file a brief in excess of 50 pages. On February 14, 1991, we denied the motion and ordered Schwager to file a 50-page brief. TEX. R. APP P. 74.(h). On March 14, 1991, we allowed Schwager to file a 60-page brief. On May 16, 1991, we struck Schwager's second brief due to inadequate citations to the record, and ordered him to rebrief. On June 17, 1991, Schwager filed this third brief, containing 44 points of error. On July 12, 1991, one of the appellees moved to strike Schwager's third brief due, among other things, to inadequate citations to the record. We denied this motion on August 8, 1991.

On February 24, 1992, we struck 42 of Schwager's 44 points of error because they did not meet the requirements of TEX R. APP P. 74. *See Inpetco v. Texas American Bank*, 729 S.W.2d 300 (Tex. 1987); *Henry S. Miller Management Corp. v. Houston State Associates*, 792 S.W.2d 128, 133-35 (Tex. App.--Houston

[1st Dist.] 1990, writ denied) (op. on reh'g); *see generally* Gunn, *Unsupported Points of Error on Appeal*, 32 So. Tex. L. Rev. 105 (1990). We held that only points of error one and four were properly briefed. Schwager has repeated moved to dismiss the appeal. These motions were taken with the case because they are also the subject of Schwager's first point of error. We will discuss the motions and the first point of error together.

Points of Error

Schwager's first point of error and his motions assert the trial court's 1989 judgment was granted without jurisdiction, and is, therefore, void.

The trial judge consolidated in 1986 and the 1987 suits under the cause number of the 1987 suit. Tex R. Civ P. 174(a). As stated, the 1986 judgment appointed a receiver to sell the partnership property. The 1989 judgment dissolved that receivership and awarded damages to TCB and to the limited partners. Schwager contends the 1989 judgment is void for lack of jurisdiction because it modified the 1986 judgment after it was final. An order appointing a receiver is interlocutory. *See* Tex Civ. Prac & Rem Code Ann § 51.014(1) (Vernon Supp. 1992) Therefore, the trial court had jurisdiction in the consolidated suit to dissolve the receivership. Otherwise, the receivership would be perpetual. Dissolving the receivership was not an improper modification of a final order. The 1986 judgment is not labeled a "final judgment," and it did not deny all relief not expressly granted. We hold the 1986 judgment was not final. It was "intrinsically interlocutory." *North East Indep. School Dist. v. Alldridge*, 400 S.W.2d 893, 897 (Tex. 1966).

In addition, that part of the 1989 judgment awarding the limited partners damages against Schwager was based on Schwager's conduct occurring after the trial in the 1986 suit. That trial was held on July 14, 1986. In the 1987 suit, the jury found that Schwager breached his fiduciary duty to the limited partners, as well as the partnership agreement, after August 11, 1986. The 1986 judgment did not adjudicate any of the various claims for damages. TCB was not a party in the 1986 suit. Therefore, the 1989 judgement did not "modify" the 1986 judgment.

The 1989 judgment is not void for lack of jurisdiction.Schwager's first point of error is overruled, and his motions to reverse the trial court's judgment and dismiss the appeal are denied. The fourth point of error asserts the trial court erroneously denied Schwager the right to open and close the evidence.

The trial court denied the Schwager parties' motion to realign the parties and designate them as plaintiffs. They argue they should have been designated "plaintiffs" in the 1987 suit, because they were plaintiffs in the 1986 suit, and the trial court erred in consolidating the two suits under the 1987 suit's cause number. They contend the trial court should have consolidated the suits under the cause number of the 1986 suit, in which they were plaintiffs. The Schwager parties do not contend they objected to the consolidation, nor do they cite to the record where they objected to the consolidation. Nothing is presented for review regarding any error in the consolidation. *See* Tex R. App P. 52(a), 74(f); *State Farm Mut. Automobile Ins. Co. v. Cowley,* 468 S.W.2d 353, 354, (Tex. 1971). Therefore, they have waived any error caused by an improper consolidation.

Moreover, TCB was a plaintiff in the 1987 suit. Its note claim and its conversion of rentals claim were tried before the jury. We find no error. *See* Tex R. Civ P. 266.

Schwager's fourth point of error is overruled.

The judgment is affirmed.

/s/Murry B. Cohen
Murry B. Cohen
Justice

Justices Bass and Wilson also sitting.
Publish. Tex R. App P 90.

Judgment rendered and opinion delivered
True Copy Attest:

3/12/92

Kathryn Cox
Clerk of Court

APPENDIX Z

Houston Chronicle
Sunday, Oct. 18, 1992

There's better way to finance judicial races that the way we do in Texas.

By Thomas R. Phillips *Phillips is chief justice of the Texas Supreme Court.*

Texans want and deserve judges who are fair, impartial and free of any suspicion that campaign contributions might influence their decisions. Every election, however, questions of judicial integrity are raised anew as judges enter the political world, raising and spending money in an effort to keep their jobs. Not surprisingly, most of these contributions come from those with a direct interest in the decisions of the courts — lawyers and, to a lesser extent, litigants. During this process, most candidates, contributors and citizens join Texas newspapers in asking: Isn't there a better way? Surely there is. Texas is currently the only state in the nation that does not place some limits on judicial campaign fund-raising, either by size of contribution, time and manner of solicitation of type of expenditure. If we are to continue to the popular election of judges, we must pass laws that help ensure public confidence in our judicial system. Although I believe that real abuses, by either judges or donors, are comparatively rare, the absence of meaningful campaign finance reform casts suspicion on our entire legal system.

Fortunately, the Legislature recognized this problem. Last year, it directed the newly formed Texas Ethics Commission to study judicial campaign finance and disclosure. The commission is conducting a series of public hearings across the state and will complete its report by Jan. 1.

At a minimum, I hope the commission will recommend these reforms:

Campaign contribution limits - The Legislature should cap individual and political action committee contributions at some reasonable limit.

That limit should be large enough to allow campaigns to raise enough to keep anyone from believing that a judge owes his or her position to the support of one individual or interest group.

Time limits - Judges (except for those holding statewide positions) are now permitted to raise campaign funds at any time, regardless of whether an election is impending or an opponent is likely. Fundraising is a necessary evil that should be strictly limited to election season. At other times, judges and those who appear before them should be free from any pressure which the political process might impose.

Shorter campaigns - Texas has a January filing deadline for a March primary for a November election for a January swearing-in, the longest campaign seasons in the nation. Judges, at least, should be permitted to spend more time deciding cases and less time attending fund-raisers.

Better financial disclosures - Judicial candidates should be required to report more information about their donors, to file their reports in more than one place to improve public access, and to prepare more frequent reports, particularly in the closing weeks of a campaign. In their annual financial statements, judges should be required to disclose any business investments or dealing with lawyers or litigants who appear before them. Of course there are other, more fundamental ways to address these problems and they should also be explored. Public financing of judicial campaigns or, better yet, changing the method of electing judges in the first place would reduce the potential for impropriety which burdens our current partisan election system. But public financing is unlikely to be embraced when the state is experiencing a revenue shortfall, and selection reform seems unlikely until the voters' rights challenge to our current system is resolved. Moreover, even those who support these reforms in principle have strong differences about the the details of their implementation. Meanwhile, we must not permit the best to be the enemy of the good. We should address the most serious problems of judicial campaign financing and reporting now, while continuing our long-term efforts toward a better overall system.